CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 FEBRUARY 8, 1995 NO. 6

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 95–10)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved January 8, 1992, to November 7, 1994, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: January 18, 1995.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: AAR Manufacturing, Inc.
Articles: Boral® sheets and strips; spent nuclear fuel storage containers
Merchandise: Boron carbide powder
Factory: Livonia, MI
Proposal signed: September 13, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 16, 1994
Revokes: T.D. 83–255–A

(B) Company: Amoco Chemical Co.
Articles: Polypropylene homopolymer resins; polypropylene copolymer resins
Merchandise: Polymer grade propylene; titanium-based catalysts
Factories: Cedar Bayou & Alvin, TX
Proposal signed: November 17, 1993
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Houston, October 11, 1994

(C) Company: ARCO Chemical Co.
Articles: Regular polystyrene (Dylark); expandable polystyrene (Dylite)
Merchandise: Styrene
Factories: Monaca, PA; Painesville, OH
Proposal signed: February 25, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, October 3, 1994

(D) Company: Banner Pharmacaps Inc.
Articles: Gelatin capsules
Merchandise: Gelatin; lecithin; fish body oils; vitamin E (d-alpha tocopheryl acetate and dl-alpha tocopherol); cod liver oil
Factory: Elizabeth, NJ
Proposal signed: May 23, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, October 3, 1994

(E) Company: Bridgestone/Firestone, Inc.
Articles: Tires
Merchandise: Steel cord; bead wire; impregnated fiberglass cord fabrics; nylon 6 fabrics; raw polyester cords
Factories: Decatur & Bloomington, IL; Lavergne & Morrison, TN; Des Moines, IA; Oklahoma City, OK; Wilson, NC; Russellville, AR
Proposal signed: July 27, 1994
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Chicago, October 20, 1994
Revokes: T.D. 90–91–B to cover additional factory locations

(F) Company: Cardinal Manufacturing, Inc.
Articles: Tetrabutyltin (TBT); tetraoctyltin (TOT); dioctyltindichloride (DOTD); monooctyltintrichloride (MOTC); monobutyltintrichloride (MBT); dibutyltindichloride (DBTD); dibutyltinoxide (DBTO); various heat stabilizers; CC401-E; CC-7711; CC7712; CC7711A; CC-7710; CC-11; CC-101FC
Merchandise: Stannic chloride (a/k/a tin tetrachloride, TTC; tin chloride, fuming (DOT); tin perchloride (DOT)
Factory: Columbia, SC
Proposal signed: August 1, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, September 27, 1994

(G) Company: Cardinal Manufacturing, Inc.
Articles: 2-mercaptoethyltallate (TME); CC-7711, CC-7712, CC-7711A; CC-7710; CC-101FC
Merchandise: 2-mercaptoethanol (2-ME) (a/k/a emery 5791, 1-ethanol-2-thiol 2-hydroxy-1-ethanethiol 2-hydroxyethylmercaptan thioglycol (DOT) USAF EK-4196)
Factory: Columbia, SC
Proposal signed: September 26, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, October 20, 1994
Revokes: Unpublished authorization of August 19, 1994

(H) Company: Du Pont Agrichemicals Caribe, Inc.
Articles: Chlorimuron ethyl technical; herbicidal formulations of chlorimuron ethyl technical
Merchandise: Ethyl 2-(isocyanatosulfonyl) benzoate a/k/a ESPI; 2-amino-4-chloro-6-methoxypyrimidine a/k/a N6186; chlorimuron ethyl technical a/k/a DPX-F6025
Factory: Manati, PR
Proposal signed: July 6, 1994
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Miami, October 3, 1994

(I) Company: Du Pont Agrichemicals Caribe, Inc.
Articles: Thifensulfuron methyl technical (DPX-M6316); herbicidal formulations of thifensulfuron methyl technical (DPX-M6316)
Merchandise: Methyl 3-sulfonylisocyanato- 2-thiophenecarboxylate (MTSI); 2-amino-4-methoxy-6-methyl-1, 3, 5,-triazine (A-4098); thifensulfuron methyl technical (DPX-M6316)
Factory: Manati, PR
Proposal signed: July 8, 1994
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Miami, October 31, 1994

(J) Company: Forté, Dupee, Sawyer Co.
Articles: Scoured wool
Merchandise: Greasy wool
Factory: Brady, TX (an agent operating under T.D. 81–181)
Proposal signed: March 16, 1994
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Boston, September 21, 1994

(K) Company: General Tire, Inc.
Articles: Tires
Merchandise: Sulfenamide accelerator (DCBS); guanidine accelerator (DPG); hindered bisphenol antioxidant; cobalt adhesion promoter; sulfenamide accelerator (TBBS); thiurum accelerator (TMTM); thiuram accelerator (TMTD); dihydro trimethyl quinoline antioxidant; thiazole accelerator (MBTS); sulfenamide accelerator (MBS)
Factories: Bryan, OH; Charlotte, NC; Mayfield, KY; Mount Vernon, IL; Barnesville, GA
Proposal signed: January 28, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 27, 1994

(L) Company: Hunt-Wesson, Inc.
Articles: Fully refined soybean oil
Merchandise: Crude soybean oil
Factories: Memphis, TN; Savannah, GA
Proposal signed: May 25, 1994
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), November 7, 1994
Revokes: Unpublished authorization of August 13, 1992

(M) Company: Optical Cable Corp.
Articles: Fiber optic cable
Merchandise: Aramid yarn
Factory: Roanoke, VA
Proposal signed: June 24, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, October 13, 1994

(N) Company: Morflex, Inc.
Articles: N, N-diethyl-M-toluamide (DEET)
Merchandise: Meta toluic acid
Factory: Greensboro, NC
Proposal signed: October 30, 1991
Basis of claim: Used in
Contract issued by RC of Customs in accordance with §191.25(b)(2): New York, January 8, 1992
Revokes: T.D. 84–155–Q to cover name change from Morflex Chemical Co., Inc.

(O) Company: Morton International, Inc.
Articles: Morthane (dry resin)
Merchandise: 1,6-hexanediol
Factory: Ringwood, IL
Proposal signed: June 17, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 27, 1994

(P) Company: Osmose Wood Preserving, Inc.
Articles: Sunwood III, a color additive
Merchandise: Dyes; dye intermediates
Factory: Buffalo, NY
Proposal signed: May 25, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 16, 1994

(Q) Company: Osram Sylvania Inc.
Articles: Inorganic luminescent materials (phosphors)
Merchandise: Yttrium oxide; europium oxide; terbium oxide; gadolinium oxide; cerium oxide; germanium dioxide; dysprosium oxide; lanthanum oxide; yttrium/europium oxide, coprecipitated
Factories: Towanda, PA; Madisonville, KY; Liquillo, PR; Exeter, NH
Proposal signed: May 11, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, October 28, 1994

(R) Company: Paragon Trade Brands
Articles: Disposable baby diapers
Merchandise: Nonwoven spunbound polypropylene
Factories: Waco, TX; Macon, GA; La Puente, CA; Harmony, PA
Proposal signed: March 25, 1994
Basis of claim: Used in, less valuable waste
Contract forwarded to RC of Customs: Houston, October 24, 1994

(S) Company: Phthalchem/Cychem Inc.
Articles: Para-toluidine-meta-sulfonic acid (4B acid-dyestuffs)
Merchandise: Para-toluidine (P-toluidine)
Factory: Cincinnati, OH
Proposal signed: April 29, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, October 20, 1994

(T) Company: Shieldalloy Metallurgical Corp.
Articles: Sodium metavanadate
Merchandise: Sodium ammonium vanadate
Factories: Newfield, NJ; Cambridge, OH
Proposal signed: March 23, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, October 22, 1992

(U) Company: United Feather & Down, Inc.
Articles: Goose down; duck down
Merchandise: Crude goose down; crude duck down
Factories: Brooklyn, NY; Chicago, IL
Proposal signed: April 27, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 16, 1994

(V) Company: Web Technologies, Inc.
Articles: Flexible packaging material
Merchandise: Polyester film
Factory: Oakville, CT
Proposal signed: December 9, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 15, 1994

(W) Company: Witco Corp.
Articles: Motor oils; hydraulic oils
Merchandise: Lube oils; brite stock
Factories: Bradford, PA; Jacksonville, FL; City of Commerce, CA; Richmond, CA; Omaha, NE
Proposal signed: May 4, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, October 11, 1994

(X) Company: World Citrus, Inc.
Articles: Orange juice from concentrate (reconstituted)
Merchandise: Concentrated orange juice for manufacturing
Factory: Winston-Salem, NC
Proposal signed: June 7, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Miami, October 12, 1994

(Y) Company: Zeneca Inc., Zeneca Pharmaceuticals Group
Articles: Tamoxifen citrate granulation; NOLVADEX® tablets
Merchandise: Tamoxifen citrate
Factory: Newark, DE
Proposal signed: March 10, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, October 13, 1994

(Z) Company: Zeneca Inc.
Articles: Waterfast Trink, Tripoly, Trilite, Trink II & Trink II Lite inks; Pro-Jet Fast Black 2
Merchandise: 1,3-benzenedicarboxcylic acid, 5-[[4-[(7-amino-1-hydroxy-3-sulfo-2-naphthahexyl)azo] 1 Naphthahexyl]] azo]-tri-sodium salt a/k/a Pro-Jet Black 287; 5-aminoisophthalic acid a/k/a 5-AIPA
Factory: Dighton, MA
Proposal signed: June 28, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, October 20, 1994

APPROVAL UNDER T.D. 84–49

(1) Company: CITGO Refining and Chemicals, Inc.
Articles: Petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factory: Corpus Christi, TX
Proposal signed: June 24, 1994
Basis of claim: As provided in T.D. 84–49
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Houston, July 7, 1994
Revokes: T.D. 89–23–1 to cover successorship of Chaplin Refining Company by Chaplin Refining and Chemicals Inc., and subsequent name change to CITGO Refining and Chemicals Inc.

19 CFR Part 101

(T.D. 95–11)

CUSTOMS SERVICE FIELD ORGANIZATION: EXTENSION OF PORT LIMITS OF HILO AND KAHULUI, HAWAII

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of Customs by extending the geographical limits of the ports of entry of Hilo and Kahului, Hawaii. The boundaries of the port of Hilo are extended to include the entire island of Hawaii. The boundaries of the port of Kahului are extended to include the entire island of Maui. The changes are being made to include all potential Customs work sites within the ports. These changes will enable Customs to obtain more efficient use of its personnel, facilities, and resources and to provide better service to carriers, importers, and the general public.

EFFECTIVE DATE: February 27, 1995.

FOR FURTHER INFORMATION CONTACT: Brad Lund, Office of Inspection and Control, 202–927–0192.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of its continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public, Customs is amending § 101.3, Customs Regulations (19 CFR 101.3), to expand the geographical limits of the ports of entry of Hilo and Kahului, Hawaii.

The expanded boundaries of the port of Hilo will include the entire island of Hawaii. The expanded boundaries of the port of Kahului will include the entire island of Maui. Expansion of the port limits for these two islands will improve service to the public and will make better use of staffing resources.

COMMENTS

Customs published a Notice of Proposed Rulemaking in the Federal Register (59 FR 43313) on August 23, 1994, which invited the public to comment on proposed changes to the limits of the ports as described above.

Seventeen comments were received, all of which approved of the proposed expansions. Accordingly, the amendments are being published in final as they were proposed.

REVISED PORT LIMITS

The revised port limits for the port of Hilo are as follows:

In the State of Hawaii: The entire island of Hawaii.

The revised port limits for the port of Kahului are as follows:

In the State of Hawaii: The entire island of Maui.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Although Customs solicited public comments on these port extensions, no notice of proposed rulemaking was required because the port extensions relate to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Agency organization matters such as these port extensions are exempt from consideration under Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson. Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

AMENDMENTS TO THE REGULATIONS

Accordingly, Part 101 of the Customs Regulations is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. The list of Customs regions, districts and ports of entry in § 101.3(b) is amended by adding the reference "T. D. 95–11", alongside both "Hilo" and "Kahului" in the column headed "Ports of entry" in the Honolulu, Hawaii District of the Pacific Region.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: December 29, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, January 27, 1995 (60 FR 5312)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 24, 1995.

The following document of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, has been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 95–3)

This ruling concerns the dutiable status of articles made with foreign components in a Foreign Trade Zone that are imported after having been exported from the zone. (19 U.S.C. 81c(a).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 9, 1995.

DIRECTOR, OFFICE OF TRADE OPERATIONS
OFFICE OF COMMERCIAL OPERATIONS
U.S. CUSTOMS SERVICE

Re: 19 U.S.C. 81c(a) Dutiable Status of Articles made in FTZ when returned to the U.S.

DEAR SIR:

This is in reference to your request for internal advice on the dutiable status of automobiles made with foreign components in a foreign trade zone if imported after being exported from the zone.

Facts:

Automobiles are made in a foreign trade zone using some parts of foreign origin. Those parts were admitted into the zone in either privileged foreign status or nonprivileged foreign status. After manufacture, the automobiles were exported to Canada without any duty having been paid on those parts. After that exportation, the automobiles are imported into the United States.

Issue:

Whether the sixth proviso to section 3 of the Foreign Trade Zones Act (19 U.S.C, 81c(a)) requires duty to be assessed on the full value of an automobile made in a zone exported and then imported into the U.S.

Law and Analysis:

The relevant statutory language is the sixth proviso to section 3 of the act of June 18, 1934 (48 Stat. 9) as amended. The sixth proviso was added by the act of June 17, 1950 (6499 Stat. 246). The statute is known as the Foreign Trade Zones Act. The proviso states:

> That articles produced or manufactured in a zone and exported therefrom shall on subsequent importation into the customs territory of the United States be subject to the import laws applicable to like articles manufactured in a foreign country, except that articles produced or manufactured in a zone exclusively with the use of domestic merchandise, the identity of which has been maintained in accordance with the second proviso of this section may, on such importation, be entered as American goods returned.

The legislative purpose of the proviso is found in S. Rpt. 1107 of September 26, 1949 on H.R 5332. With respect to the proviso the report stated:

> This section would also add a new sixth proviso to clarify the duty and tax status of articles which, after having been produced or manufactured in a zone and exported to a foreign country, are subsequently imported into customs territory of the United States. The proviso would make such articles dutiable and taxable as if manufactured in a foreign country. There is an exception, however, which would permit the free entry as American goods returned of any articles which had been produced or manufactured in a zone exclusively with the use of privileged domestic merchandise, that is, merchandise upon which the duty and tax, if any, had already been paid and the identity of which had been maintained in accordance with the second proviso to section 3 of the act.

Customs implemented the statutory provisions by the promulgation of regulations by T.D. 53010 (1952) which amended the Customs Regulations of 1943 by adding section 30.14(n). The text of that regulation was repromulgated as 19 CFR 30.14(o), (1961 ed); 19 CFR 146.46(e)(1971 ed.) and 19 CFR 146.67(e): The relevant text has remained the same since its inception in 1952.

An argument has been made that the words "be subject to the import laws applicable to like articles manufactured in a foreign country" are to be construed to mean like articles made in the specific country from which the article is sent back to the United States. Under that construction, the article made in a zone with foreign components would become an article of the country of re-exportation simply by passing through that country. It is believed that some of the automobiles involved have engines, transmissions, radios and other components of Japanese manufacture. Under the proposed interpretation, the exportation to Canada would convert those Japanese components, on which no duty was ever paid, into a Canadian-origin automobile which would be entitled to be entered duty-free under the North American Free Trade Agreement (NAFTA). Thus, such an automobile could be exported from a zone into Canada and then re-imported into the United States free of duty. Another possible consequence is that such an automobile be made in a zone, exported to France, duty-free and then re-imported into the United States through Canada, again free of duty.

The legal underpinning for that argument is said to be the case of *Mount Washington Tanker Co. v. U.S.*, 505 F. Supp 209, 1 CIT 32 (1980), Affd. 665 F.2d. 340, 69 CCPA 23 (1981). The case involved a construction of the words "repairs made in a foreign country" in 19 U.S.C. 1466(a). Under that law there was no need for the courts to determine whether the repairs were made in a specific foreign country because the assessment of duty under that law did not depend on the site of the repairs. In that case the court held that repairs made by Swedish workers in Subic Bay, Singapore, Bahrain and on the high seas were not made in the United States for the purpose of 19 U.S.C. 1466. The courts found that the purpose of the law was to protect U.S. shipyards and U.S. labor. The courts held that the repairs would be dutiable under those words if the owner of a U.S.-registered ship chose to forego the use of available U.S. labor to make the repairs. The proposition that "foreign country" means a specific foreign country is simply not found in either court's opinion. Moreover, in view of the appellate's court's caution at 69 CCPA 28 against reliance on mechanical applications of text to find statutory intent, reliance on the *Mount Washington Tanker Co.* decisions as a key to the interpretation of 19 U.S.C. 81c(a) is misplaced.

With respect to protection of U.S. labor and capital, the interpretation that the country of re-exportation becomes the country of origin is anomalous. It is unclear how the conversion of Japanese parts into a duty-free Canadian automobile by transshipment of that auto-

mobile from a zone through Canada and back to the United States would protect the makers of automobile parts in the United States that compete with the Japanese parts.

The rate of duty applicable to imported articles is governed by General Notes 1 and 3; Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202).

General Note 1 states that all goods provided for in this schedule and imported into the Customs Territory of the United States from outside thereof are subject to duty or exempt therefrom as prescribed in General notes 3 and 4 inclusive. An automobile imported into the United States from Canada is covered within the scope of General Note 1 whether or not it was made in a zone. Since General Note 4 covers products of countries designated as beneficiary developing countries for the purpose of the Generalized System of Preferences and there is no evidence such automobiles qualify under that general note, the focus must be on General Note 3.

General Note 3(a)(i), HTSUS, states that except as provided in subparagraph (iv) of this paragraph, the rates of duty in column 1 are the rates of duty applicable to all products other than those of countries enumerated in paragraph (b) of this note. Subparagraph (iv) covers products of U.S. insular possessions and paragraph (b) covers products of nine Communist countries. There is no evidence to suggest that either subparagraph (iv) or paragraph (b) applies.

Under subparagraph 3(a)(ii), the general most-favored-nation rates are made applicable to products of those countries described in subparagraph 3(a)(i) which are not subject to special tariff treatment under subparagraph 3(a)(iii). Thus, a product of a foreign trade zone which, by virtue of the sixth proviso to 19 U.S.C. 81c(a), is not entitled to be under Chapter 98, Subchapter I, HTSUS, as provided by 19 CFR 146.67(e), is dutiable at the most-favored-nation rates, unless one of the special rules apply.

It has been suggested that when the vehicles are entered into the United States from Canada they would be originating goods and thus entitled to preferential tariff treatment under the North American Free Trade Agreement.

Section 202(a) of the North American Free Trade Agreement Implementation Act (Act of December 8, 1993, 107 Stat. 2057, Pub. L. 103–182) provides in pertinent part as follows:

SEC. 202 RULES OF ORIGIN.

(A) ORIGINATING GOODS—

(1) IN GENERAL—For purposes of implementing the tariff treatment and quantitative restrictions provided for under the Agreement, except as otherwise provided in this section, a, good originates in the territory of a NAFTA country if—[xxx]

(B)(i) each nonoriginating material used in the production of the good—

(I) undergoes an applicable change in tariff classification set out in Annex 401 of the Agreement as a result of production occurring entirely in the territory of one or more of the NAFTA countries; or

(II) where no change in tariff classification is required, the good otherwise satisfies the applicable requirement 50 for such Annex; and

(ii) the good satisfies all other applicable requirements of this section;

(C) the good is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials; [xxx]

In this instance, it is argued that Section 202(a)(1) is met by virtue of the operations that are performed in the U.S. Foreign Trade Zone. However, there is specific statutory language which governs the tariff treatment of goods under these circumstances. Section 202(a)(2)(A) provides as follows:

(2) SPECIAL RULES—

(A) FOREIGN TRADE ZONES—Subparagraph (8) of paragraph (1) shall not apply to a good produced in a foreign trade zone or subzone (established pursuant to the Act of June 18, 1934, commonly known as the Foreign Trade Zones Act) that is entered for consumption in the customs territory of the United States.

Thus the statute contemplates that goods which meet the applicable rule of origin by virtue of operations performed in a United States Foreign Trade Zone will not be regarded as originating upon entry for consumption into the United States. In this case, it is clear that the operations performed in the zone will not render the vehicles originating based on the change in tariff classification that occurs to the nonoriginating materials in the zone.

It is claimed that the limitation in Section 202(a)(2)(A) is not applicable in this case. Specifically, the inquirer claims that the originating status of the goods is based on the claim

that the vehicle is produced entirely in the territory of ore or more of the NAFTA countries exclusively from originating materials, under Section 202(a)(1)(C), except for certain foreign materials which are claimed to be less than 7 percent of the value of the good and are therefore de minimis under Section 202(e). That Section implements Article 405.1 of the Agreement which, in pertinent part, provides:

[xxx]; a good shall be considered to be an originating good if the value of all non-originating materials used in the production of the good that do not undergo an applicable change in tariff classification set out in Annex 401 is not more than seven percent of the transaction value of the good, adjusted to a F.O.B. basis, or, if the transaction value of the good is unacceptable under Article 1 of the Customs Valuation Code, the value of all such non-originating materials is not more than seven percent of the total cost of the good, [xxx]

Under the terms of the above provision, the de minimis concept operates only where the materials which are claimed to be de minimis do not undergo an applicable change in tariff classification set out in Annex 401. In this instance the nonoriginating materials do undergo the applicable tariff shift in issue and are not eligible under the terms of the de minimis provision.

Therefore, a good made in a foreign trade zone using all, or some foreign parts, would not be entitled to treatment as American Goods returned by virtue of the sixth proviso to 19 U.S.C. 81c(a). As an imported good, U.S. General Notes 1 and 3, HTSUS, control its tariff treatment. As noted above, the exportation to Canada would not result in entitlement to the tariff treatment under NAFTA. The good would be dutiable under the most-favored-nation rates.

The next question is whether the value of the American components, if any, can be deducted from the dutiable value. As noted above, the relevant regulation, which has been virtually unchanged since 1952, implements the sixth proviso to 19 U.S.C. 81c(a) by providing that such goods are treated as though wholly of foreign origin.

Inasmuch as the regulation was promulgated in its current form pursuant to public notice and comment (see for example T.D. 86–16) it is unlikely that it can be challenged for a procedural defect. The argument that the regulation exceeds Congressional intent in making American parts dutiable is met by reference to similar tariff provisions.

The sixth proviso to 19 U.S.C. 81c(a) parallels the provisions of subheading 9801.00.80, HTSUS (19 U.S.C. 1202). Under that provision articles previously exported from the United States which had been made in a Customs bonded warehouse or under subheading 9813.00.05, HTSUS, and exported without duty being paid are subject to the duty of like articles not previously exported. The predecessors to subheading 9801.00.80, HTSUS, were item 804.00, TSUS and paragraph 1615(f), Tariff Act of 1930. Only an article of Canadian origin is free of duty under subheading 9801.00.80, HTSUS. See also U.S. Note 2, Chapter 98, HTSUS. which makes prior importations irrelevant unless there is an express exemption. We have determined that the mere passage through Canada's economy would not turn an automobile made in a zone with non-NAFTA parts into a duty-free Canadian automobile.

The only provision for deduction of the value of American materials from an imported article (other than an article entitled to the provisions of Chapter 98, Subchapter I, HTSUS) is subheading 9802.00.80, HTSUS. The predecessor provision was item 807.00, TSUS. See *Tariff Classification Study,* Explanatory and Background Materials, Schedule 8, pages 3–10 November 15, 1960, and *Conversion of the Tariff Schedules of the United States into the Harmonized System,* October 1986. The provision illustrates the Congressional intent to limit the benefit of deduction. The value of the American parts were included in the imported articles, dutiable value in the cases set forth below. As such, the provisions of 19 CFR 146.67(e) do no more than parallel the express Congressional purpose set forth in subheadings 9801.00.80 and 9802.00.80, HTSUS, and their predecessors. A review of several judicial decisions further shows the effect of the Congressional limitation to make a U.S. good fully dutiable if it falls outside the eligibility criteria.

The case of *The Rubberset Co. v. U.S.*, 73 Cust. Ct. 107 (1974) upheld the denial of a deduction for the value of American-made nylon filaments or bristles used to make imported paint brushes.

The Court of International Trade in *Proctor & Gamble Distributing Co. v. U.S,* 11 CIT 450 (1987), denied deduction of the value of an American-made inner diaper core from an imported diaper because the use of the material failed to meet the requirements of item 807.00, TSUS.

Likewise, in *Samsonite Corp. v. U.S.*, 702 F. Supp. 908, 12 CIT 1146 (1988), Aff'd 889 F. 2d. 1074, 8 Fed. Cir 9 (1989) the court held that it was proper to include the value of American-made steel strips in the dutiable value of imported luggage. The strips simply did not meet the criteria set by item 807.00, TSUS.

In *General Motors v. U.S.*, 976 F. 2d. 716 (Fed. Cir 1992) the Court of Appeals reversed the trial court and upheld the denial to deduct the value of sheet metal automobile components made in the United States on the importation of the automobiles because the components did not qualify under item 807.00, TSUS.

These cases show that the fact of American origin in an imported article that is otherwise dutiable at the most-favored-nation rates does not automatically result in a deduction from the value of the American component from the dutiable value. With respect to an article made in a zone, unless it is made exclusively with identified American goods, it is not entitled to treatment as American goods returned. As in the situation of American components under subheading 9802.00.80, HTSUS, the fact of American origin will not result in a deduction from the value of those components unless there is a statutory provision which so provides and we are aware of no such statute. Consequently, we conclude that 19 CFR 146.67(e) does not exceed the statutory scheme set by the sixth proviso to 19 U.S.C. 81c(a) and General Notes 1 and 3, HTSUS.

Holding:

An automobile that is made in a foreign trade zone with some foreign parts and which is exported without the payment of duty on its foreign content is dutiable on its full value at the appropriate most-favored-nation rate of duty on its importation back into the United States. Such an automobile does not qualify for duty-free treatment under the North American Free Trade Agreement.

The Office of Regulations and Rulings will take steps to make this decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels 60 days from the date of this decision.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 24, 1995.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TRACKEYE MOTION ANALYSIS SYSTEM

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930(19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of the Trackeye motion analysis system. Notice of the proposed modification was published December 21, 1994, CUSTOMS BULLETIN, Volume 28, No. 51.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 10, 1995.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 21, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, No. 51, proposing to modify NY Ruling Letter

(NY) 889158, dated August 31, 1993, which classified the Trackeye motion analysis system under subheading 9031.40.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other optical measuring and checking instruments and appliances. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY 889158 to reflect the proper classification of the Trackeye motion analysis system under subheading 9031.80.00, HTSUS, as other measuring or checking instruments and appliances. HQ 955750 modifying NY 889158, is set forth as "Attachment A" to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

Dated: January 23, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 23, 1995.

CLA–2 CO:R:C:M 955750 RFA
Category: Classification
Tariff No. 9031.80.00, 8471.91.80,
8471.92.30–8471.92.34,
8521.10.60, and 8525.30.90

MR. JOHN N. POLITIS, ESQ.
POLITIS, POLLACK & DORAM
3255 Wilshire Blvd.
Suite 1688
Los Angeles, CA 90010

Re: Trackeye automated motion analysis system; functional unit; image work station (IWS); film scanner; personal computer (PC); high resolution monitor; video cassette recorder (VCR); laser printer; optical appliances and instruments; subsidiary purpose; functional units; additional U.S. Note 3 to Chapter 90; HQs 088941, 953116 and 955230; NY 889158, modified.

DEAR MR. POLITIS:

This is in response to your letter dated January 18, 1994, requesting reconsideration of NY 889158, dated August 31, 1993, concerning the tariff classification of the Trackeye Automated Motion Analysis System under the Harmonized Tariff Schedule of the United

States (HTSUS). In preparing our ruling, we considered arguments made in our meeting on July 6,1994, as well as your supplemental submission made on October 14, 1994. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of NY 889158 was published December 21, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 51. No comments were received in response to this notice.

Facts:

The Trackeye Automated Motion Analysis System (Trackeye system), is a completely automated system designed to permit analysis of motion variables such as position, velocity, acceleration, angle and angular velocity. It consists of the following components: an image work station (IWS); a high resolution linear array film scanner; a personal computer (PC) with a VGA monitor to display system status data; a 768 by 512 pixel, high resolution monitor; a video cassette recorder (VCR); and a dedicated 300-dot per inch (300 DPI) laser printer.

The IWS, a metal air conditioned cabinet, is preprogrammed to manipulate data and analyze targets. It contains all the control and analysis software and hardware in addition to 4 specially configured magnetic video discs, giving the IWS a capacity of just over 4 Giga Bytes. The film scanner uses a charged-coupled device (CCD) high resolution linear array which has the capacity to scan up to 1,000 feet of standard 16mm and 35mm film, color or black and white (though Trackeye digitizes only in black and white). The personal computer, which contains a 486 processor with an 80 MB hard disc and 4 MB internal memory, forms the main interface and allows the operator to access all parts of the Trackeye system via a mouse and menu selections. The high resolution monitor displays the menu options and all animated and graphical data.

Issue:

What is the classification of the Trackeye Automated Motion Analysis System components when entered together or separately under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The Trackeye system consists of an IWS, a linear array film scanner, a PC with a VGA monitor, a high resolution monitor, a VCR, and a laser printer. Note 3 to Chapter 90, HTSUS, states that: "[t]he provisions of note 4 to section XVI apply to this chapter." Note 4 to section XVI provides as follows:

> Where a machine (including a combination of machines) consists of individual components * * * intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The Trackeye system meets the definition of a functional unit because it consists of individual components intended to contribute together to a clearly defined function of analyzing motion variables such as position, velocity, acceleration, angle and angular velocity.

In NY 889158, dated August 31, 1993, the Area Director of Customs, New York Seaport, classified the Trackeye system as other optical measuring and checking instruments under subheading 9031.40.00, HTSUS. To classify merchandise as an "optical appliance" or an "optical instrument", it must meet the requirements of Additional U.S. Note 3 to chapter 90, HTSUS, which states as follows:

> For the purposes of this chapter, the terms *"optical appliances"* and *"optical instruments"* refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

You agree that the complete system is provided for under heading 9031, HTSUS. However, you claim that any optics which are contained within the system are subsidiary and that the merchandise is classifiable under subheading 9031.80.00, HTSUS, as other measuring and checking instruments.

A tariff term that is not defined in the HTSUS or in the Harmonized Commodity Description and Coding System Explanatory Notes (ENs), which constitute the Customs Coopera-

tion Council's official interpretation of the HTSUS, is construed in accordance with its common and commercial meaning. *Nippon Kogaku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

In HQ 088941, dated January 16, 1992, Customs, citing *Webster's II New Riverside University Dictionary* (1984), p. 1155, defined "subsidiary" as "[s]erving to supplement or assist * * * [s]econdary in importance: subordinate." Customs further stated that the "[t]he meaning of 'subsidiary' has nothing to do with the amount of time optics are used in the overall use of a device, but it relates more to the type of task which the optics perform when being used in the operation of the device." *See also* HQ 955230, dated July 12, 1994.

The issue to be determined is whether the optics in the Trackeye system are subsidiary to the actual function of measuring or checking being performed by the merchandise. The merchandise measures and analyzes motion variables from images which are downloaded from a VCR or film scanner. The optics contained within the Trackeye system are in the film scanner. Because the optics are not involved in the measuring or checking function, we find that it is subsidiary to the function of the Trackeye system. Therefore, the Trackeye system is not classifiable as other optical measuring or checking instruments in subheading 9031.40.00, HTSUS. It is provided for under subheading 9031.80.00, HTSUS, as other measuring and checking instruments. Based upon the above analysis, NY 889158 should be modified.

You also requested that Customs determine the classification of the merchandise of the components if they are entered separately. You claim that the IWS is classifiable under heading 8471, HTSUS, as an automatic data processing (ADP) machine. In order to be classified as an ADP machine, merchandise must meet the criteria in Legal Note 5 to Chapter 84, HTSUS, which provides as follows:

> (A) For purposes of heading 8471, the expression *"automatic data processing machines"* means:
>
> (a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run * * *.
>
> * * * * * * *
>
> Heading 8471 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings.

The IWS does not meet the definition of an ADP machine because it is a dedicated processor which cannot be freely programmed to accept other programs. It works with a PC to perform the specific function of measuring or analyzing motion variables such as position, velocity, acceleration, angle and angular velocity. Based upon Legal Note 5 to Chapter 84, HTSUS, the IWS which is a dedicated processor, should be classified in the heading appropriate to its respective function of measuring. Therefore, the IWS is classifiable under subheading 9031.90.60, as parts of other measuring or checking instruments. The general, column one rate of duty is 4.3 percent *ad valorem*.

The personal computer is classifiable under subheading 8471.91.80, HTSUS, which provides for: "[a]utomatic data processing machines and units thereof; * * *: [o]ther: [d]igital processing units, whether or not entered with the rest of a system * * * [o]ther * * *." The general, column one rate of duty is 3.5 percent *ad valorem*.

The high resolution monitor is classifiable under subheading 8471.92.30, HTSUS, through subheading 8471.92.34, HTSUS, which provides for display units, depending on whether or not it contains a color cathode-ray tube.

The laser printer is classifiable under subheading 8471.92.36, HTSUS, which provides for: "[a]utomatic data processing machines and units thereof [o]ther: [i]nput or output units * * *: [o]ther: [p]rinter units: [a]ssembled units incorporating at least the media transport, control and print mechanisms: Laser: [c]apable of producing more than 20 pages per minute * * *." The general, column one rate of duty is 3 percent *ad valorem*.

Customs has previously classified CCD scanners, like the film scanner under subheading 8525.30.90, HTSUS, which provides for other television cameras. The general, column one rate of duty is 3.8 percent *ad valorem*. *See* HO 953116, dated October 6, 1993.

The VCR is classifiable under subheading 8521.10.60, HTSUS, which provides for: "[v]ideo recording or reproducing apparatus, whether or not incorporating a video tuner: [m]agnetic tape-type: [c]olor, cartridge or cassette type: [o]ther * * *." The general, column one rate of duty is 3.1 percent *ad valorem*.

Holding:

The Trackeye system is classifiable under subheading 9031.80.00, HTSUS, which provides for: "[m]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter * * *: [o]ther instruments, appliances and machines * * *." The general, column one rate of duty is 4.3 percent *ad valorem*.

Components of the Trackeye system entered separately are classified in their respective headings as listed above.

NY 889158 dated August 31, 1993, is hereby modified. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS CONCERNING THE COUNTRY OF ORIGIN MARKING OF PRODUCTS FROM THE WEST BANK AND GAZA STRIP

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed revocation of country of origin marking ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930(19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke ruling letters pertaining to the country of origin marking of goods which are produced in the West Bank and Gaza Strip. Customs' position is that these articles may be marked "West Bank" or "Gaza" alone, without the addition of the words "Israel," "Made in Israel," "Occupied Territories-Israel," or words of similar meaning. Comments are invited on the correctness of this action.

DATE: Comments must be received on or before March 10, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted

may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Special Classification and Marking Branch (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify ruling letters concerning the country of origin marking of articles which are produced in the West Bank and Gaza Strip.

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Failure to mark an article in accordance with the requirements of 19 U.S.C. 1304 shall result in the levy of a duty of ten percent *ad valorem*. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

In prior ruling letters, Customs has taken the position that acceptable forms of marking for articles which are produced in the West Bank or Gaza included "Israel," "Product of Israel," or "Israeli-Occupied West Bank (or Gaza)," or words of similar meaning. In all such instances, Customs has required that the word "Israel" must appear in the marking designation. For instance, in Headquarters Ruling Letter (HRL) **718329** dated December 21, 1981, Customs held that it is acceptable to mark goods which were produced on the West Bank of the Jordan River with the phrase "Israeli-Occupied West Bank," Made in Israel," or "Israel" and to indicate such marking designation on the Certificate of Origin Form A for purposes of the Generalized System of Preferences (GSP). In HRL **718125** dated November 12, 1981, Customs held that articles produced on the West Bank of the Jordan River may be marked with the designators "Israeli-Occupied West Bank", "Made in Israel", or "Israel" for purposes of indicating the country of origin of the merchandise pursuant to 19 U.S.C. 1304. Furthermore, in HRL **730094** dated January 30, 1987, Customs held that the proper country of origin marking designation for soap which was produced in the West Bank was "Israeli-Occupied West Bank" or simply "Israel". Finally, in HRL **734609** dated May 26, 1992, which concerned the proper country of origin marking of fruits and vegetables imported into the U.S. from the

Gaza Strip, Customs held that the designation "West Bank" was not an acceptable country of origin marking because the United States does not recognize the West Bank territory as an independent political entity. Consequently, Customs stated in HRL 734609 that as the Gaza Strip has a similar status as the West Bank, the country of origin markings, "Israel-Occupied Gaza," "Made in Israel," or "Israel" but not "Gaza" could be used on products produced in Gaza. Headquarters Ruling Letters 718329, 718125, 730094 and 734609 are set forth as "Attachments A through D" to this document.

The Department of State has advised that in accordance with the Israeli-PLO Declaration of Principles on Interim Self-Government Arrangements ("the DOP"), which was signed in Washington, DC on September 13, 1993, Israel has agreed to transfer certain powers and responsibilities to the Palestinian Authority. Under this Agreement, Israel has also consented to make a similar transfer to a superseding, elected Palestinian Council, as part of interim self-governing arrangements in the West Bank and Gaza Strip. As part of this Agreement, the Palestinian Authority has agreed to administer its own tariff revenue collection and other customs matters. The Palestinian Authority also acceded to set its own tax policy under the terms of an implementing agreement which was concluded in Cairo on May 4,1994. In view of these recent developments, the U.S. Department of the State has advised the U.S. Department of the Treasury by letter dated October 24, 1994, that, in their view, the primary purpose of 19 U.S.C. 1304 would be best served if goods which are produced in the West Bank and Gaza Strip are permitted to be marked "West Bank" or "Gaza Strip." The Department of State believes that labeling goods as coming from the "West Bank" or "Gaza" will provide American purchasers with important information indicating their origin, which is the primary purpose of 19 U.S.C. 1304.

Customs has previously relied upon advice received from the U.S. Department of State in making determinations regarding the "country of origin" of a good for marking purposes. In T.D. 47943 dated November 10, 1938, the question was whether products imported from German-occupied territories were regarded as products of Germany for the purposes of the marking provisions of the Tariff Act of 1930, and for determining applicable rates of duty. Based upon instructions given by the U.S. Department of State, Customs held that as a result of a change in jurisdiction from Czechoslovak to German in the Sudeten areas which were under German occupation, products which were manufactured in those areas and were exported on or after the date of German occupation were considered products of Germany for purposes of country of origin marking. In *United States v. Friedlaender & Co., Inc.*, C.C.P.A. (February 26, 1940), the issue involved the proper country of origin marking of imported merchandise which was wholly manufactured in Czechoslovak, but at the time the goods were exported the territory in which the goods were manufactured was under German

occupation. Customs held that marking the goods as products of Czechoslovak was not acceptable, based upon instructions set forth in T.D. 49743. The court agreed with Customs and held that as the goods were exported at a time when that part of Czechoslovakia in which the goods were manufactured was under German occupation, the marking "Czechoslovakia" was not in compliance with the requirements of the marking statute, and the goods should be marked to indicate "Germany" as the country of origin. However, in a later Treasury Decision (T.D. 51360 dated November 30, 1945), the position taken by Customs in T.D. 49743 was rescinded. In T.D. 51360, Customs stated that the U.S. Department of State advised that the boundaries of Czechoslovakia had been reestablished as they existed prior to the date of the occupation by Germany, and that the United States recognized Czechoslovakia as an independent state. Based upon this information, Customs reversed the position taken in T.D. 49743, and concluded that articles which were manufactured or produced in Czechoslovakia after May 8, 1945, should be regarded as products of Czechoslovakia for purposes of the marking provisions of the Tariff Act of 1930. Accordingly, consistent with prior Customs decisions and based upon the information we have recently received from the U.S. Department of State regarding recent agreements between Israel and the Palestinian Authority, it is proper for Customs to conclude that for purposes of 19 U.S.C. 1304, the term "country" as defined in section 134.1(a), Customs Regulations (19 CFR 134.1(a)), will include the territorial areas known as the West Bank and Gaza Strip.

On November 23, 1994, Customs issued telex 6327071, which stated that Customs is proposing to change its position regarding the country of origin marking requirements for goods made in the West Bank and Gaza Strip. In the telex, Customs stated that effective immediately merchandise which is produced in the West Bank or Gaza may properly be marked "West Bank" or "Gaza" without the addition of the words "Israel," "Product of Israel," or "Israeli-Occupied West Bank," or words of similar meaning. The telex further stated that Customs would publish a notice in the CUSTOMS BULLETIN requesting public comment on the modification or revocation of prior rulings concerning this matter. However, it was further noted in the telex that until such modification or revocation is effected, the prior rulings concerning the proper marking of goods made in the West Bank or Gaza would remain valid and goods may continue to be marked in accordance with them.

This document provides notice that Customs intends to revoke the ruling letters included in this notice [718329, 718125, 730094, 734609] to reflect the position that articles which are produced in the West Bank or Gaza Strip shall be regarded as products of the West Bank or Gaza Strip for the purposes of the marking provisions of the Tariff Act of 1930, and shall be marked as such, rather than as products of Israel. Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 20, 1995.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
December 21, 1994.

This ruling concerns country of origin designators when used on an Israeli issued Certificate of Origin Form A for Generalized System of Preferences (GSP) purposes.

Issue:

What are acceptable country of origin designators for goods produced on the West Bank of the Jordan River is connection with GSP purposes on Israeli issued Certificates of Origin Form A.

Facts:

The United States Customs Service ruled on November 12, 1981 (MAR–2–05 CO:R:E:E 718126 FBO), that "Israeli-Occupied West Bank," "Made in Israel" or "Israel" are acceptable marking designators to indicate the name of the country of origin for purposes of 19 U.S.C. 1304 (for goods produced on the West Bank of the Jordan River). The Department of State has asked Customs to issue instructions to officers at ports of entry that the use of the marking designators in the November 12, 1981, ruling would be acceptable on Certificate of Origin Form A for GSP purposes.

Law and Analysis:

If goods are shipped to the United States and valued at more than $250, the District Director of Customs may require a Certificate of Origin (Form A). This form is issued by a properly designated official in the country of origin. Israel currently administers the area of the West Bank as an occupying power and Israel is a GSP nation, therefore, administerial extension of Israel's GSP position would extend to the West Bank, and the marking designators in Customs ruling of November 12, 1981, would be acceptable for GSP purposes on the Certificates of Origin Form A.

Holding:

"Israeli-Occupied West Bank," "Made in Israel" or "Israel" are acceptable marking designators to indicate the name of the country of origin when used on Israeli issued Certificates of Origin Form A for GSP purposes and such shipments, if otherwise eligible, should, receive duty-free treatment.

ANTHONY L. PIAZZA,
Acting Director,
Entry Procedures and Penalties Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,

This ruling concerns the acceptable country or origin marking designators for goods produced on the West Bank of the Jordan River and this ruling clarifies Customs Ruling MAR-2-05 CO:R:E:E 717762 FBO, dated October 27, 1981.

Issue:

Whether the marking designators "Israeli-Occupied West Bank", "Made In Israel", or "Israel" would be acceptable to Customs for purposes of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304).

Facts:

On October 27, 1981, the Customs Service issued a ruling holding that the marking designator "Israeli-Occupied West Bank" for goods produced on the West Bank of the Jordan River is acceptable to Customs. That ruling did not explicitly supersede or revoke the marking designator "Made in Israel" previously being accepted by Customs for goods issuing from the West Bank.

Law and Analysis:

Section 304, Tariff Act of 1930, as amended, provides, in general, that all articles of foreign origin imported into the United States shall be legibly and conspicuously marked to indicate the country of origin to an ultimate purchaser in the United States.

The Department of State has advised the Customs Service that, while Israel currently administers the area of the West Bank as an occupying power, the United States Government recognizes that the sovereignty over the area is in dispute.

However, the Department of State has informed Customs that it has no objection to a Customs ruling stating which designations would be acceptable to it.

Holding:

"Israel-Occupied West Bank", "Made in Israel" or "Israel" are acceptable marking designators to indicate the name of the country of origin for purposes of 19 U.S.C. 1304.

Anthony L. Piazza.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 30, 1987.
MAR 2-05 CO:R:E:E

EASTERN GROCERY SUPPLY
9725 Bissonnet
Houston, TX 77036

GENTLEMEN:

This is in response to your letter dated December 11, 1986, regarding the proper country of origin marking for soap which is imported from the city of Nablus in the West Bank.

You submitted a sample of the soap package as it is presently marked. On one side of the package appear the words "Imported and Distributed by Eastern Grocery Supply, 9725 Bissonnet, Suite (sic), Houston, Texas 77036". On the other side appears "Product of Shakia Soap Co.-Nablus".

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) requires that foreign-made goods or their containers be marked to indicate to the ultimate purchaser the English name of the country of origin of those goods.

Products from the West Bank may be marked "Israeli-occupied West Bank" or merely "Israel." Such marking must appear in a conspicuous location on the package and in lettering large enough to be readily seen without strain by the ultimate purchaser. Adding either of these markings after "Product of Shakia Soap Co.-Nablus," in the same sized lettering would be acceptable.

STEVEN I. PINTER,
Chief,
Entry, Licensing and Restricted Merchandise Branch.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 26, 1992.

MAR–2–05 CO:R:C:V 734609

MR. S. M. MCGEEHAN, JR.
THE ANSTAN CORPORATION
RFD 1, Box 346
Limerick, ME 04048

DEAR MR. MCGEEHAN:

This is in response to your letter of April 21, 1992, and your follow up letter of May 20, 1992, transmitted to our offices by fax regarding the proper country of origin marking for fruits and vegetables exported to the U.S. from the Gaza Strip, in occupied Israel. You state that you were advised by the Department of Commerce that due to a recent unfair labor practice decision, products of the occupied territories cannot be marked "Product of Israel," and that products must be marked as from the district they originate (i.e. Gaza or West Bank).

We have contacted the Department of Commerce, and they have informed us that they do not have a position on the country of origin marking requirements for products exported from the Israeli occupied territories. The Department of Commerce further indicated that the decisions regarding the GSP and Israeli Free Trade status of the products from the occupied territories do not impact on the country of origin marking requirements. All decisions on the country of origin marking requirements are within the jurisdiction of the U.S. Customs Service.

Section 304 of Tariff Act of 1930, as amended, (19 USC 1304) requires products of foreign origin imported in the U.S. to be marked with their country of origin. For purposes of this statute, country means the political entity known as a nation. Section 134.1(b) Customs Regulations (19 CFR 134.1(b)). Customs has previously ruled that the acceptable forms of marking for products made in the West Bank could be "Israel-occupied West Bank," "Made in Israel," or "Israel". (See HQ 718125, November 12, 1981). The marking "West Bank" is not acceptable because the United States does not recognize the West Bank territory as an independent political entity. Likewise, because the Gaza Strip has a similar status as the West Bank, the markings, "Israel-Occupied Gaza," "Made in Israel," or "Israel" but not Gaza could be used on products produced in Gaza.

We recognize that this is a politically sensitive issue and we would be willing to consider alternative country of origin markings for products made in Israeli occupied Gaza that satisfy the statutory and regulatory requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF METALLIZED PLASTIC GARLANDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of metallized plastic garlands.

DATE: Comments must be received on or before March 10, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Food and Chemicals Classification Branch, Office of Regulations Rulings (202) 482–6976.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the classification of metallized plastic garlands.

In New York Ruling Letter (NYRL) 884592, issued April 13, 1993, various metallized plastic garlands were classified in subheadings 3921.90.4090 and 3926.90.9590 (now 3926.90.9890), Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provide for "Other plates, sheets, film, foil and strip, of plastics: Other: Other: Other," and "Other articles of plastics * * *: Other: Other, Other," respectively. The ruling letter is set forth in Attachment A to this document.

Upon further review of the ruling, this office is of the opinion that the primarily decorative function of the nondurable, entertainment articles indicates that their classification as articles of plastics in the headings of chapter 39, HTSUS, is not appropriate.

Customs intends to modify this ruling to reflect proper classification of the merchandise in subheading 9505.90.40, HTSUS, the provision for "Festive, carnival or other entertainment articles * * *: Other: Confetti, paper spirals or streamers * * * parts and accessories thereof."

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying NYRL 884592 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 20, 1995.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 13, 1993.

CLA–2–39:S:N:N6:221 884592
Category: Classification
Tariff No. 3921.90.4090 and 3926.90.9590

MR. DAVID MALINA
SILVESTRI CORPORATION
2720 North Paulina Street
Chicago, IL 60614

Re: The tariff classification of metallized plastic garlands from Taiwan.

DEAR MR. MALINA:

In your letter dated March 8, 1993, you requested a tariff classification ruling.

The sample submitted with your letter is identified as a PVC foil Christmas tree garland, item #74402. It consists of a strip of metallized polyvinyl chloride (PVC) plastic, measuring 4 inches in width, imported on a 25 foot roll. A steel wire is sealed into each of the two edges of the garland, allowing the strip to be bent folded and shaped for decorating purposes. You indicate that the wire was incorporated into the strip during the extrusion process. Samples of other styles of garland were not submitted.

The applicable subheading for style # 74402 garland, or other garlands made of metallized plastic strip when the wire is incorporated during the extrusion process, and when the strip is not further worked such as by crinkling, will be 3921.90.4090, Harmonized Tariff Schedule of the United States (HTS), which provides for other plates, sheets, film, foil and strip, of plastics, flexible, other. The rate of duty will be 4.2 percent *ad valorem*.

The applicable subheading for garlands made of plastic strip when the strip has been further worked, such as be crinkling or when wire has been incorporated as a separate step subsequent to extrusion, will be 3926.90.9590, HTS, which provides for other articles of plastics, other.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 CO:R:C:F 957501 GGD
Category: Classification
Tariff No. 9505.90.40

MR. DAVID MALINA
SILVESTRI CORPORATION
2720 North Paulina Street
Chicago, IL 60614

Re: Modification of New York Ruling Letter (NYRL) 884592; metallized plastic garlands; other entertainment articles; not other foil and strip of plastics, nor other articles of plastics.

DEAR MR. MALINA:

In NYRL 884592, issued April 13, 1993, an article identified as a polyvinyl chloride (PVC) foil Christmas tree garland (item no. 74402) was classified in subheading 3921.90.4090, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Other plates, sheets, film, foil and strip, of plastics: Other: Other: Other." You were further advised that the applicable subheading for metallized plastic garlands that have been further worked-such as by crinkling or by incorporating wire as a separate step after (as opposed to during) extrusion-would be 3926.90.9590 (now 3926.90.9890), HTSUSA, which provides for "Other articles of plastics * * *: Other: Other, Other." We have reviewed that ruling and have found it to be partially in error. The correct classification is as follows.

Facts:

The only sample article submitted consisted of a strip of metallized PVC plastic, imported on a 25 foot roll, measuring approximately 4 inches in width. Steel wire had been sealed into each of the two edges of the garland (during the extrusion process), allowing for the strip to be bent, folded, and shaped for decorating purposes.

Issue:

What is the proper classification of the metallized plastic garlands?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 9505, HTSUS, provides for, among other items, festive, carnival or other entertainment articles. The EN to heading 9505 states, in part, that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of nondurable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.

In general, merchandise is classifiable in heading 9505, HTSUS, as a *festive article* when the article, *as a whole:*

1. is of non-durable material or, generally, is not purchased because of its extreme worth, or intrinsic value (e.g., paper, cardboard, metal foil, glass fiber, plastic, wood);
2. functions primarily as a decoration (e.g., its primary function is not utilitarian); and

3. is traditionally associated or used with a particular festival (e.g., stockings and tree ornaments for Christmas, decorative eggs for Easter).

An article's satisfaction of these three criteria is indicative of classification as a festive article. The motif of an item is not dispositive of its classification and, consequently, does not transform an item into a festive article.

The subject garlands are made of non-durable material. We consider articles such as these to be made of non-durable material, since they are not designed for sustained wear and tear, and are not purchased for their extreme worth or value (as would be decorative, yet costly pieces of art or crystal). In addition, their primary function is decorative, as opposed to utilitarian. Upon examination of the third criterion, however, and despite the sample product's name, we do not find these to be the type of items traditionally associated with a particular festival, such as Christmas. Although it is Customs position that certain types of garlands may be classified as traditional, festive articles (*See* Headquarters Ruling Letter (HRL) 950999, issued April 16, 1992, concerning Christmas garlands), we find that the metallized plastic garlands' failure to satisfy the third criterion indicates that their classification as **festive articles** is not appropriate. In light of their decorative aspect and non-durability, however, classification as **other entertainment articles** in heading 9505, may be indicated.

In HRL 953062, issued March 8, 1993, this office classified an article identified as a "paper wired plaid garland" as an other entertainment article in subheading 9505.90.40, HTSUS. The item was described as being red, green, yellow, black, and brown in color, having wire enclosed within the paper on its borders, and measuring 2¼ inches in width by 8 feet in length. In HRL 957432, issued January 12, 1995, an article identified as an "Easter garland foil ribbon," was also classified in subheading 9505.90.40, HTSUS. The item measured approximately 2⅛ inches in width, was imported on a 25 foot roll, and consisted of pink and silver colored polypropylene strips that had been heat-sealed or compressed together, with 2 wires inserted along the length, and having a crinkled appearance. We find that both the PVC foil Christmas tree garland, and the other metallized plastic garlands that have been further worked, are sufficiently similar to the non-durable, decorative items previously classified as other entertainment articles in the cited HRLs. They are, therefore, properly classified in subheading 9505.90.40, HTSUS.

Holding:

The PVC foil Christmas tree garland (item no. 74402) and the other metallized plastic garlands that have been further worked are properly classified in subheading 9505.90.40, HTSUS, the provision for "Festive, carnival or other entertainment articles * * *: Other: Confetti, paper spirals or streamers * * * parts and accessories thereof." Under the tariff effective January 1, 1995, the applicable duty rate is free.

NYRL 884592, dated April 13, 1993, is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A HUNTING GLOVE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of hunting gloves. Notice of the proposed modification was published December 14, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 50.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after April 10, 1995.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 14, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 50, proposing to modify Headquarters Ruling Letter (HRL) 952420 (4/9/93), concerning the tariff classification of hunting gloves. No comments were received from interested parties.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is modifying HRL 952420 to reflect proper classification of the hunting gloves under subheading 6216.00.4600, HTSUSA, which provides for gloves specially designed for use in sports. HRL 957042, modifying HRL 952420, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.910(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 18, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE.
Washington, DC, January 18, 1995.

CLA–2 CO:R:C:T 957042 SK
Category: Classification
Tariff No. 6216.00.4600

WELTZ & POSNER
EMPIRE STATE BUILDING
350 Fifth Avenue, ste. 7610
New York, NY 10118

Re: Modification of HRL 952420 (4/9/93); classification of a hunting glove under 6216.00.4600, HTSUSA; gloves specially designed for use in sports; tapered index finger; camouflage; non-slip palm; gloves marketed as hunting gloves; HRL 089769 (10/8/91).

DEAR MR. POSNER:

On April 9, 1993, Customs issued you, on behalf of your client, Gates-Mills, Inc., Headquarters Ruling Letter (HRL) 952420 in which we responded to your request for a reconsideration of New York Ruling Letter (NYRL) 871650, dated March 20, 1992. In HRL 952420, this office affirmed the holding in NYRL 871650 and classified the subject glove, referenced style number 2936, under subheading 6216.00.3225, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Customs determined that the subject glove was not specially designed for use in hunting, and therefore was not classifiable as a glove specially designed for use in sports under subheading 6216.00.4600, HTSUSA. Upon review, HRL 952420 is determined to be in error. Our analysis follows.

Facts:

The merchandise at issue, style 2936, is a woven nylon full-fingered glove. The outer shell has a green, brown and black camouflage design and approximately 1 millimeter of plastic foam is bonded to its inner surface. The palm side of the glove has a textile-backed vinyl overlay which extends across the palm to the thumb, index and middle finger. The permanent lining is composed of 2 millimeters foam and fiberfill with a knit nylon substrate. The glove has fourchettes, an elasticized wrist, applied knit cuffs, and a hook and clasp.

Issue:

Whether style 2936 is classifiable as a glove specially designed for use in sports?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Style 2936 is a cold weather glove possessing several features indicative of a special design for use in hunting. The glove has a tapered index finger for easier finger tip access to the trigger and has "action back," a design feature which allows greater hand flexibility and grip. "Action back" is created by two deep ½-inch pleats that open up and are spaced 2 inches apart. The palm on style 2936 also features "Toughtek," which is a textured surface which imparts a non-slip grip and allows the glove to remain soft and pliable in all types of weather. Lastly, the glove contains insulation which allows for added warmth without creating unwanted bulk. The outer shell is available in a variety of camouflage designs.

In HRL 089769, dated October 8, 1991, Customs recognized the following glove design characteristics as indictive of "some intent to design * * * gloves as hunting gloves." The cited features include:

—a non-skid reinforcement, which includes the two shooting fingers;
—a camouflage outershell or outershell with enhanced visibility;
—insulation that enhances warmth without creating excess bulk; and
—a hook and clasp closure.

Not only does style 2936 possess these features, thereby creating a presumption that these gloves were specially designed as hunting gloves, but they also possess additional features indicative of such design. As stated *supra*, the subject gloves feature a tapered index finger for easier finger tip access to the trigger and "action back" pleats which allow for greater hand flexibility.

The presumption that style 2936 has been specially designed as a hunting glove is further bolstered by the prodigious amount of advertising, trade information and related extrinsic evidence submitted by Gates-Mills, Inc. Several sporting goods magazines were submitted for Customs' examination which depict similar gloves being worn by hunters. In addition, Gates-Mills, Inc. employs a staff which works solely in the hunting trades and maintains over 700 accounts at hunting and sporting good stores.

Based on the foregoing evidence, it is this office's opinion that style 2936 has been specially designed for use in hunting and therefore warrants classification under subheading 6216.00.4600, HTSUSA, which provides for, *inter alia*, gloves specially designed for use in sports.

Holding:

HRL 952420 is modified.

Style 2936 is classifiable under subheading 6216.00.4600, HTSUSA, which provides for, "[G]loves, mittens and mitts: other: of man-made fibers: other gloves, mittens and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts * * *," dutiable at a rate of 5.2 percent *ad valorem*. There is no textile quota category applicable to the merchandise at this time.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

John Durant,
Director,
Commercial Rulings Division.

PARTIAL REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SHIELDED FABRIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of partial revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is partially revoking a ruling letter pertaining to the tariff classification of shielded fabric. Notice of the proposed revocation was published December 14, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 50.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after April 10, 1995.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 14, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 50, proposing to partially revoke Headquarters Ruling Letter (HRL) 086337 (4/19/90), concerning the tariff classification of shielded fabric. No comments were received from interested parties.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–1 82, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is partially revoking HRL 086337 to reflect proper classification of the shielded fabric that is for technical use in subheading 5911.10.2000, HTSUSA, which provides for "[T]extile products and articles, for technical uses, specified in note 7 to this chapter: textile fabrics, felt and felt-lined woven fabrics, coated covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes: other * * *." HRL 957059, partially revoking HRL 086337, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.910(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 18, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 18, 1995.

CLA-2 CO:R:C:T 957059SK
Category: Classification
Tariff No. 5911.10.2000

KIU KINTETSU INTERMODAL (U.S.A.) INC.
711 Glasgow Avenue
Inglewood, CA 90301

Re: Partial revocation of HRL 086337 (4/19/90); classification of shielded fabric; classification in heading 5911, HTSUSA, mandates that the fabric be for "technical use"; the fabric must also be one of the fabrics enumerated in Note 7(a)(i)-(vi) to Chapter 59; HRL 956956 (9/23/94); HRL 952421(5/14/93); shielded fabric used in wall coverings, drapery, upholstery and clothing is *not* for technical use.

DEAR MS. LOPEZ:

On April 19, 1990, Customs issued you Headquarters Ruling Letter (HRL) 086337 in which this office classified various shielded fabrics under subheading 5407.60.2025 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for, *inter alia*, woven fabrics of synthetic filament yarn. In that ruling Customs determined that as the subject fabric was not for technical use, classification was precluded from heading 5911, HTSUSA. Upon review, that determination is deemed to be partially in error. Our analysis follows.

Facts:

Three samples are at issue. Sample A is woven from filament polyester man-made fibers which are then subjected to an electroless plating process which coats the fabric with copper. The fabric is constructed of a tight 50 denier weave with a $96 \pm 3 \times 84 \pm 3$ count, and has a finished weight of 76 grams per square meter with a metal content of 30 percent by weight.

Sample B is also woven from filament polyester man-made fibers. These fibers are then subject to an electroless plating process which coats the fabric with copper and nickel. This fabric has a similar construction to Sample A.

Sample C is made of Sheer Shield (TM) fabric, a woven mesh of uniform and extremely fine polyester monofilaments. This fabric is plated with copper and then coated with black acrylic resin (plastic) to reduce glare.

These materials will be used, *inter alia*, for bonding straps, cables and connectors, for use in conductive gaskets, protective clothing for various industries and shielded environments (*i.e.*, tents and draperies) and for wall coverings and upholstery.

Issue:

Whether the subject metallized shielded fabrics are classifiable as technical fabrics of heading 5911, HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification will be determined by the terms of the headings, and any relative section or chapter notes.

Chapter 5911, HTSUSA, provides for textile products and articles for technical uses so long as they are specified in Note 7 to Chapter 59. Note 7 to Chapter 59 reads:

> "Heading 5911 applies to the following goods, which do not fall in any other heading of Section XI:
>
> (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
>
> (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for other technical purposes;
>
> (ii) Bolting cloth;
>
> (iii) Straining cloth of a kind used in oil presses or the like, of textile material or human hair;

(iv) Flat woven textile fabric with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or other technical purposes;
(v) Textile fabric reinforced with metal, of a kind used for technical purposes;
(vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials.

(b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices), of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, polishing discs and other machinery parts)."

In order for a fabric to be classifiable in heading 5911, HTSUSA, two prerequisites need be met: 1) the fabric must be one of the fabrics enumerated in Note 7(a)(i) through (vi); and 2) the fabric must be for technical use.

In the instant case, all of the fabrics consist of woven and nonwoven nylon covered with copper, copper and nickel, or copper and acrylic resin. As such, the subject fabrics are enumerated in Note 7(a)(i) to Chapter 59 in that they have been "coated, covered or laminated with rubber, leather **or other material"** [emphasis added].

It is this office's opinion that *some* of the shielded fabrics at issue in HRL 086337 satisfy the second prerequisite for classification in heading 5911, HTSUSA, which requires that the fabric be for technical use. To the extent that the subject fabrics are used in electrical or mechanical machinery or apparatus (for use in gaskets, panels, glare shields and for use in bonding straps, cables and connectors), they are deemed to be for technical use. This office has previously determined that similar fabric, used in the manufacture of EMI and glare shields for video display terminals, was deemed "for technical use." *See* HRL 952421, dated May 14, 1993. *See also* HRL 956956, dated September 28, 1994, in which this office classified similar fabric used in the manufacture of shielding gaskets as technical fabric of heading 5911, HTSUSA. We note that the subject fabric which is used as wall coverings, upholstery, window draperies, tents or protective clothing is not deemed for technical use and classification will be precluded from heading 5911, HTSUSA.

The shielded fabric in HRL 086337 which is used in electrical or mechanical machinery or apparatus (for use in gaskets, panels, glare shields and for use in bonding straps, cables and connectors), is classifiable under subheading 5911.10.2000, HTSUSA, which provides for, *inter alia*, coated textile fabrics for technical use.

The shielded fabric in HRL 086337 which is used for wall coverings, upholstery, window draperies, tents or protective clothing is *not* deemed for technical use and classification is proper under subheading 5407.60.9925, HTSUSA, (the successor to subheading 5407.60.2025 under the current HTSUSA).

Holding:

HRL 086337 is partially revoked.

The subject textile fabrics (metallized shielded fabrics) plated with either copper, a copper/nickel combination, or copper and acrylic resin, that are used in electrical or mechanical machinery or apparatus (for use in gaskets, panels, glare shields and for use in bonding straps, cables and connectors), are classifiable under subheading 5911.10.2000, HTSUSA which provides for, "[T]extile products and articles, for technical uses, specified in note 7 to this chapter: textile fabrics, felt and felt-lined woven fabrics, coated covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes: other * * *," dutiable at a rate of 7.1 percent *ad valorem*.

The shielded fabric used for wall coverings, upholstery, window draperies, tents or protective clothing in HRL 086337 is not deemed for technical use and classification remains under subheading 5407.60.9925, HTSUSA, (the successor to subheading 5407.60.2025 under the current HTSUSA) which provides for, "[W]oven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404: other woven fabrics, containing 85 percent or more by weight of non-textured polyester filaments: other: other * * * dyed: weighing not more than 170 grams per square meter: flat fabrics." The applicable rate of duty is 16.8 percent *ad valorem* and the textile category is 619.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF WIND SHIRT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a garment known as a wind shirt. Notice of the proposed modification was published December 14, 1994, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 10, 1995.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7050)

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 14, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 50, proposing to modify Headquarters Ruling Letter (HRL) 956222, dated April 21, 1994, which classified a women's woven upper body garment, known as a wind shirt, as a women's other woven garment, in subheading 6211.43.0060, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 956222 to reflect the proper classification of the wind shirt at issue therein as a jacket, similar to a windbreaker, in subheading 6202.93.4500, HTSUSA, if it meets the water resistance test of U.S. Note 2, Chapter 62, HTSUSA, or in sub-

heading 6202.93.5011, HTSUSA, if it fails to meet the water resistance test. HRL 95W344 modifying HRL 956222 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 18, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 18, 1995.

CLA–2 CO:R:C:T 957344 CMR
Category: Classification
Tariff No. 6202.93.4500 and 6202.93.5011

MR. PATRICK SHERIDAN
SENIOR CUSTOMS REPRESENTATIVE
11/Fl., St. John's Building
33 Garden Road, Central
Hong Kong

Re: Modification of HRL 956222; classification of a wind shirt; classifiable as a jacket, similar to a windbreaker.

DEAR MR. SHERIDAN:

On April 21, 1994, this office issued a ruling to you in regard to a request by Rena Gabriel for the classification of a woven pullover referred to as a wind shirt. Other than the sample, we had no information regarding the garment use in the United States. Since the time we issued Headquarters Ruling Letter (HRL) 956222, Customs has received more information regarding the use of garments such as the one ruled on in HRL 956222. Based upon that additional information, we are modifying HRL 956222 to reflect proper classification of the garment at issue therein as a jacket, similar to a windbreaker, in heading 6202, HTSUSA. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HRL 956222 was published December 14, 1994, In the CUSTOMS BULLETIN, Volume 28, Number 50.

Facts:

The sample in HRL 956222 was described as:

> a woven pullover upper body garment. The garment is made with 100 percent nylon woven fabric with a 600 mm coating (which we assume is a plastics). The garment features long sleeves, a round neckline with rib knit trim, rib knit cuffs, and a rib knit bottom. The rib knit fabric is made of 65 percent polyester/35 percent cotton or 100 percent cotton fabric. The garment will be made In the People's Republic of China, Sri Lanka or Bangladesh.

Issue:

Was the garment classified in HRL 956222 properly classified as a women's other garment (blouse excluded from heading 6206) of heading 6211, HTSUSA, or is it more properly classified as a women's jacket, similar to a windbreaker in heading 6202, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

In HRL 956982, Customs recently classified a garment very similar to the garment classified in HRL 956222. The garment in HRL 956982 was described as a windjacket and its use in the United States was described as for wear on golf courses during inclement weather. In addition, catalogue advertising was submitted showing the garment described as a windjacket.

As the garment in HRL 956222 is so similar to that in HRL 956982, with the exception being that intended use was not described in HRL 956222, Customs believes the garments should be classified in the same manner. Therefore, Customs Is modifying HRL 956222 to reflect proper classification of the garment therein to be as a women's woven man-made fiber jacket, similar to a windbreaker in heading 6202, HTSUSA.

Holding:

The wind shirt of HRL 956222 is properly classified as a women's woven man-made fiber jacket, similar to a windbreaker, in subheading 6202.93.4500, HTSUSA, if it meets the water resistance test of U.S. Note 2, Chapter 62. Garments classified therein are dutiable at 7.6 percent *ad valorem*. If the garment does not meet the water resistance test, it is classified in subheading 6202.93.5011, HTSUSA, and is dutiable at 29.3 percent *ad valorem*. The garment falls in textile category 635.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current Information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an Internal issuance of the U.S. Customs Service which is updated weekly and Is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HRL 956222 dated April 21, 1994, is hereby modified. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO THE COUNTRY OF ORIGIN OF SHEETS

ACTION: Notice of proposed modification of four country of origin rulings.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify four rulings, all of which concern the country of origin of flat sheets. These rulings involve the determination of the country of origin of flat bed sheets which have had capping or piping added to them. Comments reinvited on the correctness of the proposed rulings.

DATE: Comments must be received on or before March 10, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Textiles Classification Branch, (202) 482–7029

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify four rulings, all of which concern the country of origin of flat bed sheets. Comments are invited on the correctness of the proposed rulings.

New York Ruling Letter (NY) 890346, issued October 8, 1993, by Area Director of Customs, New York Seaport, ruled, among other things, that the country of origin of flat sheets that were cut and hemmed on three sides and finished (presumably on the fourth side) with capping was the country where the sheets were cut and finished.

Customs Headquarters Ruling (HQ) 955780, issued May 17, 1994, by the Director, Commercial Rulings Division, Customs Headquarters, ruled, among other things, that the country of origin of flat sheets was the country where the fabric was cut and hemmed on all four sides and a row of piping added.

Customs Headquarters Ruling (HQ) 953378, issued February 19, 1993, by the Director, Commercial Rulings Division, Customs Head-

quarters, ruled, among other things, that the country of origin of flat sheets was the country where the fabric was cut to length and width (we assume that it was cut on all four sides), hemmed, and had either piping inserted into the top edge seam or capping sewn along the top edge.

Customs Headquarters Ruling (HQ) 952909, issued April 12, 1993, by the Director, Commercial Rulings Division, Customs Headquarters, ruled, among other things, that the country of origin of flat sheets was the country where the fabric was cut to length and width (we assume that it was cut on all four sides), hemmed, and a narrow strip of fabric (piping) inserted into a seam.

After reviewing the matter at the request of the Area Director, New York Seaport, Customs agrees with the Area Director that the determinations in NY 890346, HQ 955780, HQ 953378, and HQ 952909 concerning the country of origin of the fitted sheets with capping or piping is not in accord Customs current position concerning the interpretation and application of § 12.130, Customs Regulations (19 CFR § 12.130).

§ 12.130 states that a textile or textile product consisting of materials processed in more than one foreign country shall be a product of the country where the last substantial transformation occurs. It also provides that a textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Customs has consistently ruled that the cutting of fabric on all four sides, and hemming, did not involve sufficient processing to constitute "substantial manufacturing or processing operations." To rise to that level, there must be processing in addition to cutting and hemming. Adding capping or piping to that processing will not suffice. Piping takes little expense and practically no time. Capping usually is used in place of hemming to finish an edge. Both are done for minor decorative purposes which have no relation to the utility or manner of use of the sheet. Capping and piping are distinguishable from adding four inch borders (or extra pieces of fabric) which add length, or from substantial ruffles which create a major visual impact and, to a degree, change the nature (and possibly the use) of the sheet.

Customs intends to modify NY 890346, HQ 955780, HQ 953378, and HQ 952909 to reflect that the proper country of origin of flat bed sheets which are cut on four sides, hemmed, and have either capping and/or piping added is the country where the fabric was woven. Before taking this action, consideration will be given to any written comments timely received. Each of the rulings to be modified are appended as Attachments A through D to this document. The proposed rulings modifying NY 890346, HQ 955780, HQ 953378, and HQ 952909 are appended as Attachments E through H to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of notice.

Dated: January 18, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 8, 1993.

CLA–2–63:S:N:N6:349 890346
Category: Classification
Tariff No. 6302.21.2020,
6302.21.2040, 6302.22.2010,
and 6302.22.2020

MS. GAIL T. CUMINS
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
Sixty Seven Broad Street
New York, NY 10004

Re: The tariff classification of sheet and pillowcase sets from Thailand.

DEAR MS. CUMINS:

In your letter dated September 15, 1993, on behalf of the Morgan Group Inc., you requested a tariff classification ruling.

You have submitted three sheet sets each of which consists of two pillowcases, a flat sheet and a fitted sheet. Each blended fabric set will be manufactured in two versions. One version of the set will be made from a chief weight cotton woven fabric, while the other will be made from a chief weight polyester woven fabric. Except for the fiber contents1 the two versions are identical.

Rolls of woven printed fabric are manufactured in Pakistan and shipped to Thailand. In Thailand the fabric is cut to both length and width, sewn to form the components of the set and packed into retail sets. The sample pillowcases are folded in half and sewn on two sides with a hemmed opening on the fourth for the insertion of a pillow. The corners of the fitted sheets have been elasticized and all four sides have been cut and hemmed. The three flat sheets have been cut and hemmed on both sides and the bottom edge. Other than the printed designs, the construction of the top edge of the flat sheet is the major difference between the sets. One flat sheet is finished with a contrasting capping. The second sheet is finished with an approximately 4 inch wide straight border and the third flat sheet has an approximately 4 inch wide ruffled border added along the top edge. Both the straight and ruffled borders are made from self fabric.

Since the pillowcases and the sheets in the sets containing the capped and straight bordered flat sheets are classifiable under the same heading, they are not considered a set for tariff purposes and are classifiable separately. The set with the ruffled flat sheet meets the "put up in sets for retail sale" definition and will be classified as such.

Country of origin determinations for textile products are subject to Section 12.130 of the Customs Regulations (19 CFR 12.130). Section 12.130(b) provides that a textile product that is processed in more than one country or territory shall be a product of that country or territory where it last underwent a substantial transformation. A textile product will be

considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce. The three sheet sets have been subjected to a substantial manufacturing or processing operation and are considered to be a product of Thailand.

The applicable subheading for the chief weight cotton pillowcases in the sets that contain the capped and straight bordered flat sheets will be 6302.21.2020, Harmonized Tariff Schedule of the United States (HTS), which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen, printed: of cotton: other * * * pillowcases, other than bolster cases: not napped. The rate of duty will be 7.6 percent *ad valorem*.

The applicable subheading for the chief weight cotton capped and straight bordered flat sheets and the accompanying fitted sheets will be 6302.21.2040, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen, printed: of cotton: other * * * sheets: not napped. The rate of duty will be 7.6 percent *ad valorem*.

The applicable subheading for the entire chief weight cotton sheet set that contains the ruffled flat sheet will be 6302.21.2040, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen, printed: of cotton: other * * * sheets: not napped. The rate of duty will be 7.6 percent *ad valorem*.

The applicable subheading for the chief weight polyester pillowcases in the sets that contain the capped and straight bordered flat sheets will be 6302.22.2010, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen, printed: of man-made fibers: other * * * pillow cases. The rate of duty will be 13 percent *ad valorem*.

The applicable subheading for the chief weight polyester capped and straight bordered flat sheets and the accompanying fitted sheets will be 6302.22.2020, HTS, which provides for bed linen, table linen1 toilet linen and kitchen linen: other bed linen, printed: of man-made fibers: other * * * sheets. The rate of duty will be 13 percent *ad valorem*.

The applicable subheading for the entire chief weight polyester sheet set that contains the ruffled flat sheet will be 6302.22.2020, HTS, which provides for bed linen, table linen, toilet linen and kitchen linen: other bed linen, printed: of man-made fibers: other * * * sheets. The rate of duty will be 13 percent *ad valorem*.

The pillowcases of chief weight cotton fall within textile category designation 360 and the chief weight cotton sheets fall within textile category designation 361. The pillowcases and sheets of chief weight polyester fall within textile category designation 666. Based upon international trade agreements, products of Thailand are subject to visa requirements.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. if the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 17, 1994.
CLA–2 CO:R:C:T 955780 CAB
Category: Classification

MS. MARY JO MUOIO
WOLF D. BARTH CO. INC.
90 West Street
New York, NY 10006

Re: Country of origin of a fitted sheet, flat sheet, and pillowcase; Section 12.130, Customs Regulations.

DEAR MS. MUOIO:

This is in response to your inquiry of January 19, 1994, requesting a country of origin determination for bed linen. This request is on behalf of your client, Ascot & Company. A sample set comprised of a fined sheet, flat sheet, and pillowcase was submitted for examination.

Facts:

The articles in question are constructed of a woven blend of 70 percent cotton and 30 percent polyester fabric. You also state that future imported merchandise may be constructed of 55 percent polyester and 45 percent cotton fabric. The manufacturing process includes the following: The material is woven, printed or dyed in Pakistan. The fabric is then shipped to Thailand where the fabric is cut and sewn into the finished product. The flat sheet is cut to length and width (four sides), and hemmed. After the flat sheet is hemmed, either a row of piping, a four inch ruffle, or a four inch piece of fabric is inserted into the seam four inches from the hemmed top edge. The fitted sheet is cut to length and width (four sides), and elastic is attached to two sides, while the other two sides are hemmed. The pillowcase is cut on all four sides, hemmed, folded, and a four inch ruffle is inserted along the folded top edge. The above descriptions are based on the representative samples and the information in your submission.

Issue:

What is the country of origin for the merchandise in question?

Law and Analysis:

Country of origin determinations for textile products are subject to Section 12.130, Customs Regulations (19 CFR 12.130). Section 12.130 provides that a textile product that is processed in more than one country or territory shall be a product of that country or territory where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Section 12.130(d), Customs Regulations, sets forth criteria for determining whether a substantial information of a textile product has taken place. This regulation states these criteria are not exhaustive; one or any combination of criteria may be determinative, and additional factors may be considered.

Section 12.130(d)(1), Customs Regulations, states that a new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:

(i) Commercial designation or identity, (ii) Fundamental character or (iii) Commercial use.

Section 12.130(d)(2), Customs Regulations, states that for determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered:

(i) the physical change in the material or article;
(ii) The time involved in the manufacturing or processing operation;
(iii) The complexity of the manufacturing or processing operation;
(iv) The level or degree of skill and/or technology required; and,
(v) The value added to the article or material.

Section 12.130(e)(i)(iv), Customs Regulations, states that a textile article will usually be a product of a particular country if the cutting of the fabric into parts and the assembly of those parts into the completed article has occurred in that country. However, 12.130(e)(2)(ii), Customs Regulations, states that a material will usually not be considered to be a product of a particular foreign country by virtue of merely having undergone cutting to length or width and hemming or overlocking fabrics which are readily identifiable as being intended for a particular commercial use.

When making a determination as to whether fabric used to make sheets has been substantially transformed, the minimum processing required is cutting the fabric to length and width (four sides). After the fabric has been cut on four sides, Customs assesses the additional processing and makes a determination as to whether the additional processing coupled with culling, amounts to a substantial manufacturing operation.

In prior cases, Customs has evaluated the degree of skill, value, and amount of time expended to manufacture sheets and made substantial transformation determinations accordingly. In Headquarters Ruling Letter (HRL) 952909, dated April 12, 1993, Customs determined that fabric that had been cut to length and width, coupled with the additional processing required to attach piping to flat sheets, amounted to a substantial manufacturing operation. In HRL 952225, dated December 8, 1992, Customs determined that the flat sheet processing operation in Thailand which included cutting fabric to length and width, hemming, and adorning with either piping or ruffles was sufficiently complex so as to amount to a substantial transformation in Thailand.

In your submission, you state that fabric is manufactured in Pakistan, cut to length and width in Thailand, and piping, ruffles, or a four inch top edge wilt be attached to the flat sheet in Thailand. The submitted sample is cut to length and width, hemmed, and has a four inch top edge added to the flat sheet. See HRL 953378, dated February 19, 1993, where Customs examined the manufacturing process involved in adding capping and piping to a flat sheet. Customs explained that the processing required to add capping and piping to a flat sheet involves sewing a band of fabric to finish the sheet's top edge, forming a seam. The side edges of the band are sewn to the sheet's edges. Finally, capping or piping is sewn along the top edge of the seam. The four inch top edge inserted into the seam of the subject flat sheet appears to be a form of capping or piping. This additional processing done to the subject flat sheet is more complex and timeconsuming than merely cutting flat sheets on four sides and hemming them. in light of the prior cited Customs rulings, it appears that the processing involved in constructing the flat sheet amounts to a substantial manufacturing operation within the purview of Section 12.130. Therefore, in accordance with prior Customs rulings, the country of origin of the flat sheet is the country where the last substantial manufacturing operation occurred, Thailand.

The processing necessary to convert fabric manufactured in Pakistan into a finished fitted sheet in Thailand includes, cutting on all four sides, hemming, and sewing elastic to two sides and hemming the other two sides. The degree of difficulty and skill involved in the processing required to transform the material at issue into a fitted sheet will be enough to result in a new and different article of commerce. Therefore, the country of origin of the fitted sheet is Thailand.

In determining the country of origin for pillowcases, Customs refers to *Belcrest Linens v. United States*, 741 F.2d 1368, (Fed. Cir. 1984). The court held that a bolt of woven fabric that was manufactured, stenciled with embroidery, and imprinted with lines of demarcation in China prior to being sent to Hong Kong where the fabric was cut, sewn into pillowcases, and packaged was subject to its last substantial transformation in Hong Kong. Thus, when applying the court's rationale to the instant scenario, it appears that the fabric which will be cut and sewn into pillowcases in Thailand will undergo its last substantial transformation in that country..

Holding:

The country of origin of the flat sheet, fitted sheet, and pillowcase is Thailand.

This ruling is issued pursuant to the provisions of Part 177 Customs Regulations (19 CFR Part 177). The holding in this ruling only applies to the specific factual situation presented and the merchandise identified in the ruling request. If the information furnished is not accurate or complete, or there is a change in the factual situation, this ruling will no longer be valid. In such an event, a new ruling request should be submitted.

Your attention is directed to the Notice of Proposed Rule Making which the Customs Service published in the Federal Register on Monday, January 3, 1994 (59 FR 141). That notice proposed objective rules for determining the country of origin of goods imported into the

United-States. Although, the notice stated that the proposed rules were intended to codify our present origin rules, there are a few areas where the proposed rules are not consistent with Customs present position. The transaction described in this ruling is one of those instances. Accordingly, you should be aware that if the proposed rules are adopted as published, this ruling will no longer be valid and a different result may apply.

HUBBARD VOLENICK.
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 19, 1993.
CLA-2 CO:R:C:T 953378 CAB
Category: Classification

MR. JOSEPH A. GLEICHER
POLY-COMMODITY CORPORATION
175 Great Neck Road
Great Neck Plaza, NY 11021

Re: Modification of HRL 952070; Country of origin determination of flat sheets that contain piping, capping, and ruffles.

DEAR MR. GLEICHER:

This letter is in reference to Headquarters Ruling Letter (HRL) 952070 dated September 24, 1992, issued to you from this office, regarding the country of origin of flat sheets with capping, piping, and ruffles. Upon further review Customs has determined that its holding in HRL 952070 with regard to the country of origin of the merchandise is in error.

Facts:

HRL 952070 concerned the country of origin of flat sheets containing capping, piping, and ruffles. Woven fabric was manufactured, bleached, brushed, and printed in Pakistan. The rolls of fabric were then shipped to Thailand where they were cut to length and width, hemmed, and contrasting fabric sewn onto the sheets1 top edge forming a seam. The first sample had capping sewn along the top edge of the seam. The second sample had piping inserted into the seam of the top edge. The third sample had two overlapping ruffles sewn to the edge. In HRL 952070, Customs determined that the processing operations in Thailand were not sufficiently complex to amount to a substantial transformation in compliance with Section 12.130.

Issue:

What is the country of origin for the merchandise in question?

Law and Analysis:

Country of origin determinations for textile products are subject to Section 12.130, Customs Regulations (19 CFR 12.130). Section 12.139 provides that a textile product that is processed in more than one country or territory shall be a product of that country or territory where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Section 12.130(d), Customs Regulations, sets forth criteria for determining whether a substantial transformation of a textile product has taken place. This regulation states these criteria are not exhaustive; one or any combination of criteria may be determinative, and additional factors may be considered.

Section 12.130(d)(1), Customs Regulations, states that a new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:

(i) Commercial designation or identity, (ii) Fundamental character or (iii) Commercial use.

Section 12.130(d)(2), Customs Regulations, states that for determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered

(i) The physical change in the material or article
(ii) The time involved in the manufacturing or processing
(iii) The complexity of the manufacturing or processing
(iv) The level or degree of skill
(v) The value added to the article of material

Country of origin determinations for textile products are subject to Section 12.130, Customs Regulations (19 CFR 12.130). Section 12.130 provides that a textile product that is processed in more than one country or territory shall be a product of that country or territory where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Headquarters Ruling Letter (HRL) 952579 dated November 25, 1992, confronted the issue of where the last substantial transformation occurred when flat sheets had been processed in three countries. Customs concluded that the last substantial transformation occurred in Country "A" where the fabric had been manufactured; and not in either Country "B" where the fabric was bleached and printed, or Country "X" where the fabric was brushed, shrunk1 cut, and hemmed. See also, HRL 086523 dated April 25, 1990, where Customs determined that bed sheets made out of material woven, dyed and printed in Pakistan were considered to be products of Pakistan even though the material was cut to length and hemmed in Dubai. The processes performed in Dubai, (i.e., cutting to length and hemming), did not constitute a substantial transformation.

In this instance the woven fabric was manufactured, bleached, brushed, and printed in Pakistan. This fabric was then sent to Thailand where it was cut to **length and width,** hemmed, and had either capping, piping, or ruffles added to the finished product. The issue presented is whether the processing in Thailand, was substantial enough to result in a new and different article of commerce. If the processing was sufficiently complex to warrant such a result, then the merchandise in question will have undergone its last substantial transformation in Thailand.

As emphasized in the cited rulings, Customs has consistently held that minor processing (cutting and hemming) of flat bed sheets does not constitute a substantial transformation within the meaning of Section 12.130. However, in the instant case, the fabric in question has been cut to both **length and width,** hemmed and had capping, piping, or ruffles added to the finished product. The processing required to add capping and piping to a flat sheet involves sewing a band of fabric to finish the sheet's top edge, forming a seam. The side edges of the band are sewn to the sheet's edges. Finally, capping or piping are sewn along the top edge of the seam. The processing necessary to add a ruffle to a flat sheet includes hemming the exposed edge of the ruffle, hemming the side edges of the ruffle, and sewing the bottom edge of the ruffle to the top edge of the sheet. This additional processing done on the instant merchandise is more complex and time-consuming, then merely cutting flat sheets on four sides and hemming them.

Holding:

When fabric is cut to **length and width** and hemmed in order to construct a flat sheet, a new and different article of commerce is created. However, in order for a substantial transformation to result within the purview of Section 12.130, there must be additional processing that is sufficiently complex so as to constitute a substantial manufacturing operation. In this case, cutting the fabric to **length and width** coupled with the additional processing required to attach the capping, piping, or ruffles to the flat sheets is sufficiently complex so as to constitute a substantial transformation. Therefore, the country of origin of the flat sheets is Thailand.

This notice to you should be considered a modification of HRL 952070 under 19 CFR 177.9(d)(1). It is not to be applied retroactively to HRL 952070 (19 CFR 177.9(d)(2)) and will not, therefore, affect past transactions for the importation of your merchandise under that ruling. However, for the purposes of future transactions of merchandise of this type, HRL 952070 will not be valid precedent. We recognize that pending transactions may be adversely affected by this modification, in that current contracts for importations arriving at a port subsequent to this decision will be affected pursuant to it. If such a situation arises, you may at your discretion, notify this office and apply for such relief from the bind-

ing effects as may be warranted by the circumstances. However, please be advised that in some instances involving import restraints, such relief may require separate approvals from other government agencies.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 12, 1993.

CLA–2 CO:R:C:T 952909 CAB
Category: Classification

JOHN M. PETERSON, ESQ.
NEVILLE, PETERSON & WILLIAMS
39 Broadway
New York, NY 10006

Re: Country of origin of flat sheets, fitted sheets, comforter covers, and pillowcases; section 12.130, customs regulations; duvet covers.

DEAR MR. PETERSON:

This letter is in response to your inquiry of November 5, 1992, requesting a country of origin determination, on behalf of Natural Feather and Textiles, Inc., for flat sheets, fitted sheets, comforter covers, and pillow cases. This merchandise will be imported at various ports including Los Angeles/Long Beach, Seattle and Minneapolis. No samples were submitted for examination.

Facts:

Fabric constructed of 100 percent greige cotton will be manufactured in the People's Republic of China, hereinafter "China". The greige fabric will then be singed, bleached and dyed. The dyed fabric will then be sent in bolts to Hong Kong for additional processing. The merchandise is further processed as follows:

FLAT SHEETS

Hong Kong—The-rolls of fabric will be cut to both length and width. The top edge of the fabric will be folded over to form the top hem. During the construction of the top hem, a narrow strip of woven fabric will be inserted between the folded portion of the fabric. In order to secure the strip of woven fabric, the top portion of the material will be stitched horizontally. You refer to this strip of fabric as "color blocking". customs has consistently referred to this narrow strip of material attached to bed linen as "piping". The material will then be hemmed on the sides and the bottom, folded, and packaged for exportation.

PILLOWCASES

Hong Kong—The fabric will be cut to length and width, hemmed, sewn on three sides, folded, and packaged for exportation.

FITTED SHEETS

Hong Kong—The fabric will be cut to length and width, gussets will be marked and cut, the corner gussets will be sewn and hemmed on all four sides. Elastic will be fitted and sewn along the corners, the top, and bottom of the fabric. The item will then be folded and packaged for export to the United States.

COMFORTER COVERS

The fabric will be marked, cut to both length and width, hemmed, sewn together on the sides, marked for button holes, button holes sewn and cut into the fabric, and buttons attached.

Issue:

What is the country of origin for the merchandise in question?

Law and Analysis:

Country of origin determinations for textile products are subject to Section 12.130, Customs Regulations (19 CFR 12.130). Section 12.130 provides that a textile product that is processed in more than one country or territory shall be a product of that country or territory where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

Section 12.130(d), Customs Regulations, sets forth criteria for determining whether a substantial transformation of a textile product has taken place. This regulation states these criteria are not exhaustive; one or any combination of criteria may be determinative, and additional factors may be considered.

Section 12.130(d)(1), Customs Regulations, states that a new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:

(i) Commercial designation or identity, (ii) Fundamental character or (iii) Commercial use.

Section 12.130(d)(2), Customs Regulations, states that for determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered!

(i) The physical change in the material or article
(ii) The time involved in the manufacturing or processing
(iii) The complexity of the manufacturing or processing
(iv) The level or degree of skill
(v) The value added to the article or material

Section 12.130(e)(1)(iv), Customs Regulations, states that a textile article will usually be a product of a particular country if the cutting of the fabric into parts and the assembly of those parts in the completed article has occurred in that country. However, 12.130(e)(2)(ii) states that a material will usually not be considered to be a product of a particular foreign country by virtue of merely having undergone cutting to length or width and hemming or overlocking fabrics which are readily identifiable as being intended for a particular commercial use.

Headquarters Ruling Letter (HRL) 952579 dated November 25, 1992, confronted the issue of where the last substantial transformation occurred when flat sheets had been processed in three countries. Customs concluded that the last substantial transformation occurred in Country "A" where the fabric had been manufactured; and not in either Country "B" where the fabric was bleached and printed, or Country "X" where the fabric was brushed, shrunk, cut, and hemmed. See also, HRL 952577 dated February 1, 1993, where Customs was faced with a country of origin question regarding flat sheets that had been manufactured, bleached and printed in China, and cut and hemmed in Mauritius. Customs held that the processing in Mauritius did not amount to a substantial transformation in accordance with Section 12.130.

In this instance, the woven fabric will be manufactured in China. The fabric is then exported to Hong Kong for further processing. This additional processing includes cutting the fabric to length and width, hemming, and sewing piping to the sheet's top edge. The issue present is whether the processing in Hong Kong will be substantially complex so as to constitute substantial manufacturing or processing operations within the meaning of Section 12.130(d).

Customs has consistently held that minor processing (cutting and hemming) of flat bed sheets does not constitute a substantial transformation within the meaning of Section 12.130. However, in the instant case, the fabric in question will be cut to both length and width, hemmed, and adorned with piping. The processing required to add piping to a flat sheet involves an extra manufacturing step which is more complex and time-consuming, then merely cutting flat sheets and hemming them.

When fabric is cut to length and width and hemmed in order to construct a flat sheet, a new and different article of commerce is created. However, in order for a substantial transformation to result within the purview of Section 12.130, there must be additional processing that is sufficiently complex so as to constitute a substantial manufacturing operation.

In this case, cutting the fabric to length and width coupled with the additional processing required to attach the piping will result in the material undergoing a complex manufacturing operation in Hong Kong. Therefore, the country of origin of the flat sheets at issue will be Hong Kong. This conclusion is in accordance with the holding in HRL 952225 dated December 8, 1992, where Customs determined that the flat sheet processing operation in Thailand which included cutting fabric to length and width, hemming, and adorning with either piping or ruffles was sufficiently complex so as to amount to a substantial transformation in Thailand.

The processing necessary to convert the fabric into fitted sheets in Hong Kong will include marking, cutting to length and width, and sewing elastic to the top, bottom, and corners of the sheet. The degree of difficulty and skill involved in the processing required to transform the material at issue into a fitted sheet will be enough to result in a new and different article of commerce. Therefore, the fitted sheets will undergo a substantial transformation in Hong Kong.

When determining the country of origin for pillowcases, Customs refers to *Belcrest Linens v. United States*, 741 F.2d 1368, (Fed. Cir. 1984). The court held that a bolt of woven fabric that was manufactured, stenciled with embroidery, and imprinted with lines of demarcation in China prior to being sent to Hong Kong where the fabric was cut, sewn into pillowcases, and packaged was subject to its last substantial transformation in Hong Kong. Thus, when applying the court's rationale to the instant case, it appears that the fabric which will be cut and sewn into pillow cases in Hong Kong will undergo its last substantial transformation in that country.

The comforter covers will be cut to length and width, folded and sewn together on the sides. Buttons will also be added to the finished product. The manufacturing operation involved in making the finished comforter covers is commensurate in degree of skill and amount of time to that required in the manufacturing operations involved in making fitted sheets, pillow cases, and adorned sheets. As a result of this additional complex processing, the fabric will become a new and different article of commerce. Therefore, within the purview of Section 12.130, the comforter covers will undergo a substantial transformation in Hong Kong. This conclusion is in accordance with HRL 733180 of December 13, 1990, which determined that fabric manufactured in Turkey and sent to Australia to be made into comforter covers underwent its last substantial transformation in Australia.

Holding:

Based on the foregoing, the country of origin of the flat sheets, pillow cases, comforter covers, and fitted sheets is Hong Kong.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in section 177.9(b)(1), Customs Regulations (19 CFR 177.9(b)(1)). This section states that a ruling letter is issued on the assumption that all of the information furnished in connection, with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication is accurate and complete in every material respect. Should it subsequently be determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, it is recommended that a new ruling request be submitted in accordance with Section 177.2, Customs Regulations 19 CFR 177.2).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957463 PR
Category: Classification

GAIL CUMINS, ESQUIRE
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: Reconsideration and Modification of NY 890346 concerning the country of origin of sheets.

DEAR MS. CUMINS:

This is in reference to New York Ruling Letter (NY) 890346, issued October 8, 1993, by the Area Director of Customs, New York Seaport, addressed to you on behalf of Morgan Group Inc., concerning the country of origin of sheets. We have reviewed that ruling and determined that it is partially in error. This modifies that ruling.

Facts:

According to the information contained in NY 890346, the goods in question are flat bed sheets manufactured as follows: Woven fabric manufactured in Pakistan is shipped to Thailand where it is cut and hemmed on three sides and the remaining side is with contrasting capping.

Issue:

The issue presented is which country, Pakistan or Thailand is the country of origin of the subject sheets.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed *by means of substantial manufacturing or processing operations* into a new and different article of commerce.

Customs has consistently ruled that the cutting of fabric on all four sides, and hemming, did not, by itself, involve sufficient processing to constitute "substantial manufacturing or processing operations." See the most recent ruling, HQ 956030, of November, 22, 1994. To rise to that level, there must be processing in addition to cutting and hemming. Adding capping or piping to that processing will not suffice. Piping takes little expense and practically no time. Capping usually is used in place of hemming to finish an edge. Both are done for minor decorative purposes which have no relation to the utility or manner of use of the sheet. Capping and piping are distinguishable from adding four inch borders (or extra pieces of fabric) which add length, or from substantial ruffles which create a major visual impact and, to a degree, change the nature (and possibly the use) of the sheet.

Holding:

The country of origin of the flat sheets that were only hemmed on three sides and had capping added to the fourth side is Pakistan. NY 890346, dated October 8, 1993, is hereby modified to reflect this holding. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957463 PR
Category: Classification

MARY JO MUOIO
WOLF D. BARTH CO., INC.
90 West Street
New York, NY 10006

Re: Reconsideration and modification of HQ 955780 concerning the country of origin of sheets.

DEAR MS. MUOIO:

This is in reference to Customs Headquarters Ruling Letter (HQ) 955780, issued May 17, 1994, by this office, addressed to you on behalf of Ascot & Company, concerning the country of origin of sheets. We have reviewed that ruling and determined that it is partially in error. This modifies that ruling.

Facts:

The goods this ruling is concerned with are described in HQ 955780 as flat bed sheets manufactured as follows: Woven fabric manufactured in Pakistan is shipped to Thailand where it is cut and hemmed on four sides and a row of piping is added.

Issue:

The issue presented is which country, Pakistan or Thailand is the country of origin of the subject sheets.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed *by means of substantial manufacturing or processing operations* into a new and different article of commerce.

Customs has consistently ruled that the cutting of fabric on all four sides, and hemming, did not, by itself, involve sufficient processing to constitute "substantial manufacturing or processing operations." See the most recent ruling, HQ 956030, of November, 22, 1994. To rise to that level, there must be processing in addition to cutting and hemming. Adding piping to that processing will not suffice. Piping takes little expense and practically no time. It is done for minor decorative purposes which have no relation to the utility or manner of use of the sheet.

Holding:

The country of origin of the flat sheets that were cut and hemmed on four sides and had piping added is Pakistan. HQ 955780, issued May 17, 1994, is hereby modified to reflect this holding. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957463 PR
Category: Classification

MR. JOSEPH A. GLEICHER
POLY-COMMODITY CORPORATION
175 Great Neck Road
Great Neck Plaza, NY 11021

Re: Reconsideration and modification of HQ 953378 concerning the country of origin of sheets.

DEAR MR. GLEICHER:

This is in reference to CustomS Headquarters Ruling Letter (HQ) 953378, issued February 19, 1993, addressed to you, concerning the country of origin of sheets. We have reviewed that ruling and determined that it is partially in error. This modifies that ruling.

Facts:

The goods this ruling is concerned with are described in HQ 953378 as flat bed sheets manufactured as follows: Woven fabric manufactured in Pakistan is shipped to Thailand where it is cut to length and width (we assume that means that each sheet is cut on four sides) and hemmed. On one sample a row of piping was inserted along the top edge while a second sample had capping applied to the top edge.

Issue:

The issue presented is which country, Pakistan or Thailand is the country of origin of the subject sheets.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed *by means of substantial manufacturing or processing operations* into a new and different article of commerce.

Customs has consistently ruled that the cutting of fabric on all four sides, and hemming, did not, by itself, involve sufficient processing to constitute "substantial manufacturing or processing operations." See the most recent ruling, HQ 956030, of November, 22, 1994. To rise to that level, there must be processing in addition to cutting and hemming. Adding capping or piping to that processing will not suffice. Piping takes little expense and practically no time. Capping usually is used in place of hemming to finish an edge. Both are done for minor decorative purposes which have no relation to the utility or manner of use of the sheet. Capping and piping are distinguishable from adding four inch borders (or extra pieces of fabric) which add length, or from substantial ruffles which create a major visual impact and, to a degree, change the nature (and possibly the use) of the sheet.

Holding:

The country of origin of the flat sheets that had piping and/or capping added to the fourth side is Pakistan. HQ 953378, dated February 19, 1993, is hereby modified to reflect this holding. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 CO:R:C:T 957463 PR
Category: Classification

JOHN M. PETERSON, ESQUIRE
NEVILLE, PETERSON & WILLIAMS
39 Broadway
New York, NY 10006

Re: Reconsideration and modification of HQ 952909 concerning the country of origin of sheets.

DEAR MR. PETERSON:

This is in reference to Customs Headquarters Ruling Letter (HQ) 952909, dated April 12, 1993, by this office, addressed to you on behalf of Natural Feather and Textiles, Inc., concerning the country of origin of sheets. We have reviewed that ruling and determined that it is partially in error. This modifies that ruling.

Facts:

The goods this ruling is concerned with are described in HQ 952909 as flat bed sheets manufactured as follows: Woven fabric manufactured in China is shipped to Hong Kong where it is cut to length and width (we assume that means that each sheet is cut on four sides) and hemmed. A row of piping is inserted near the top of the sheet.

Issue:

The issue presented is which country, China or Hong Kong, is the country of origin of the subject sheets.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed *by means of substantial manufacturing or processing operations* into a new and different article of commerce.

Customs has consistently ruled that the cutting of fabric on all four sides, and hemming, did not, by itself, involve sufficient processing to constitute "substantial manufacturing or processing operations." See the most recent ruling, HQ 956030, of November, 22, 1994. To rise to that level, there must be processing in addition to cutting and hemming. Adding piping to that processing will not suffice. Piping takes little expense and practically no time. It is done for minor decorative purposes which have no relation to the utility or manner of use of the sheet.

Holding:

The country of origin of the flat sheets that were cut and hemmed on four sides and had piping added is China. HQ 952909, dated April 12, 1993, is hereby modified to reflect this holding. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

FILING OF CONTRACTS AND CERTIFICATIONS COVERING TEXTILE AND APPAREL PRODUCTS UNDER SECTION 334 OF THE URUGUAY ROUND AGREEMENTS ACT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document advises the public of the requirements and procedures that must be followed in filing contracts and certifications with Customs in order to preclude application of new origin principles to textile and apparel products entered, or withdrawn from warehouse, for consumption during the period of July 1, 1996 through January 1, 1998, as provided in section 334 of the Uruguay Round Agreements Act (the Act). If a contract and certification are not filed with Customs in accordance with the procedures set forth in this document, such textile and apparel products will be subject to the origin principles contained in section 334(b) of the Act.

DATE: Contracts and certifications must be filed with Customs on or before February 6, 1995.

ADDRESS: Contracts and certifications must be filed with the Director, Office of Trade Operations, Attention: Lisa Crosby, Room 1325, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Lisa Crosby, Office of Trade Operations (202–927–0163).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1994, President Clinton signed into law the Uruguay Round Agreements Act (the Act), Public Law 103–465, 108 Stat. 4809. Subtitle D of Title III of the Act deals with textiles and includes section 334 which concerns rules of origin for textile and apparel products.

Paragraph (a) of section 334 provides that the Secretary of the Treasury shall prescribe rules implementing the principles contained in paragraph (b) for determining the origin of textiles and apparel products. Paragraph (a) further provides that such rules must be promulgated in final form not later than July 1, 1995.

Paragraph (b) of section 334 incorporates the following provisions: (1) general rules for determining when, for purposes of the customs laws and the administration of quantitative restrictions, a textile or apparel product originates in a country, territory, or insular possession, and is the growth, product, or manufacture of that country, territory, or insular possession; (2) special origin rules for certain identified goods; (3) a multicountry rule for determining origin when the origin of a good cannot be determined under the preceding provisions of paragraph (b);

(4) special rules governing the treatment of components which are cut to shape in the United States from foreign fabric or are products of the United States and which are exported for assembly and returned to the United States; and (5) an exception to the application of section 334 in the case of the United States-Israel Free Trade Agreement, which specifically provides for the continued application of the rulings and administrative practices that were applied, immediately before the enactment of the Act, to determine the origin of textile and apparel products covered by that Agreement, unless such rulings and practices are modified by the mutual consent of the United States and Israel.

Paragraph (c) of section 334 provides that section 334 shall apply to goods entered, or withdrawn from warehouse, for consumption on or after July 1, 1996. However, paragraph (c) further provides that section 334 shall not apply to goods if:

(1) the contract for the sale of such goods to the United States is entered into before July 20, 1994;

(2) all of the material terms of sale in such contract, including the price and quantity of the goods, are fixed and determinable before July 20, 1994;

(3) a copy of the contract is filed with the Commissioner of Customs within 60 days after the date of the enactment of the Act, together with a certification that the contract meets the requirements of paragraphs (1) and (2) above; and

(4) the goods are entered, or withdrawn from warehouse, for consumption on or before January 1, 1998.

Paragraph (c) was included in section 334 in recognition of the fact that application of the origin principles contained in paragraph (b) may result in origin determinations that are different from the result that would have been reached under prior law and administrative practice, thus causing undue hardship to persons who had already entered into binding contracts based on existing law and administrative practice.

Since the required rules implementing the principles of paragraph (b) of section 334 are currently at the pre-publication stage and thus are not available for reference, members of the public must refer to the provisions as contained in paragraph (b) of the statute in order to assess the need for filing a contract and certification with Customs as provided for in paragraph (c). The procedures applicable to the filing of such contracts and certifications are set forth below.

PROCEDURES FOR FILING CONTRACTS AND CERTIFICATIONS

A legible and complete copy of each contract, together with the required certification signed by the U.S. party to the contract or authorized officer or agent thereof, must be filed with the Director, Office of Trade Operations, Attention: Lisa Crosby, Room 1325, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, DC 20229, on or before February 6, 1995. Customs will provide written confirmation of each timely filing within five working days of the date of receipt of the filed documents. Contracts and certifications which are submitted by

mail or courier service and which are received by Customs after February 6, 1995, will not be considered to have been timely filed unless they reflect a postmark or other date of transmission of February 6, 1995, or earlier. If a contract and certification which otherwise meet the terms of section 334(c) of the Act are not filed with Customs in accordance with the procedures set forth herein, the textile and apparel products covered by the contract will be subject to the origin principles contained in section 334(b) of the Act.

Following review of each contract and certification, Customs will determine whether the filed documents meet the requirements of paragraph (c) of section 334 and will provide written notice to the filing party regarding that determination. A separate notice will be published at an appropriate future date regarding the entry or other procedures to be followed for the period of July 1, 1996 through January 1, 1998, in the case of goods covered by contracts found by Customs to meet the requirements of paragraph (c) of section 334.

Dated: January 24, 1995.

A.W. TENNANT,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, January 27, 1995 (60 FR 5457)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 24, 1995.

The following document of the United States Customs Service, Office of Commercial Operations, office of Regulations and Rulings, has been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 18, 1995.

REGIONAL DIRECTOR
COMMERCIAL OPERATIONS DIVISION
New Orleans, LA

Re: Favorable opinion in *Texaco Marine Services, Inc., and Texaco Refining and Marketing, Inc. v. United States,* CAFC, Slip Op. 93–1354.

Attached please find a copy of the above-referenced opinion of the U.S. Court of Appeals for the Federal Circuit (CAFC). The court's holding affirms that of the U.S. Court of International Trade (CIT) (815 F. Supp. 1484 (1993)) that certain expenses for post-repair cleaning and protective coverings performed in conjunction with dutiable repairs constitutes "expenses of repairs" as that term is used in the vessel repair statute (19 U.S.C. § 1466) and are therefore dutiable. Accordingly, liquidation may proceed for any entries that your Vessel Repair Liquidation Unit (VRLU) may have been withholding pursuant to § 177.7(b), Customs Regulations.

Questions have arisen as to the impact of this decision on the work of the various VRLUs. In reviewing the above-referenced opinion, you will find of significant importance not only the court's holding that the expenses in question are dutiable, but also th underlying rational of the court's decision. Specifically, the CAFC upheld the "but for" test proffered by the government and adopted by the CIT; that it, the expenses in question would not have been necessary "but for" the dutiable repairs. Consequently, having met the "but for" test, these costs were held to be "expenses of repairs" within the meaning of 19 U.S.C. § 1466.

We find particularly instructive the court's discussion of the language of the statute as set forth below:

> "* * * the language 'expenses of repairs' is broad and unqualified. As such, we interpret 'expenses of repairs' as covering all expenses (not specifically excepted in the statute) which, *but for* dutiable work, would not have been incurred." (emphasis added; see last paragraph of p. 10 of the opinion)

The court then goes on to say:

> "Conversely, 'expenses of repairs' does not cover expenses that have been incurred even without the occurrence of dutiable repair work. As will be more clearly illustrated below * * * the 'but for' interpretation accords with what is commonly understood to be an expense of a repair." (see first two sentences at the top of p. 11 of the opinion)

In regard to the first sentence of the above passage, the court further clarifies its position by stating, "* * * expenses that would have been incurred irrespective of whether or not dutiable repairs are performed are not dutiable as an expense of repairs." (see second full sentence on p. 17 of the opinion)

It is readily apparent that this case has wide-ranging ramifications with respect to Customs liquidation of vessel repair entries. For example, as you well know we currently do not consider the following foreign costs dutiable under the vessel repair statute: air, crane, drydocking charges, electricity, travel/transportation, launch use, lodging, security and stag-

ing. Absent these costs being incurred pursuant to events such as a regularly scheduled survey or in conjunction with work that would otherwise be nondutiable or remissible (e.g., a modification or casualty), they would undoubtedly constitute durable "expenses of repairs" under the "but for" test discussed above. Consequently, any of the aforementioned costs contained in vessel repair entries not finally liquidated as of the date of the CAFC decision (December 29, 1994) should be liquidated as dutiable as "expenses of repairs" *provided* they pass the "but for" test discussed above. We emphasize that this list of costs is not all inclusive; other foreign costs not herein discussed should undergo the same scrutiny. consequently, your VRLU should further review any entries not yet liquidated as of the aforementioned date so that they may be fully in accord with the views of the court as stated above. Copies of this memorandum as well as the subject court case are being distributed to all of the VRLUs for their reference.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations & Rulings.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–4)

FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG CUSCINETTI S.P.A., FAG (U.K.) LTD., BARDEN CORP. (U.K.) LTD., FAG BEARINGS CORP., AND BARDEN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP., AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 92–07–00487

Plaintiffs challenge certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") affirmative determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992). Plaintiffs allege that Commerce erroneously employed a methodology to calculate plaintiffs' assessment rates for U.S. entries of German- and Italian-origin bearings which used entered values of sampled sales rather than actual entered values, although actual entered values were the best information available. This matter is before the Court on plaintiffs' motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of this Court.

Held: Plaintiffs' motion is granted to the extent that the this case is remanded to Commerce to determine whether, considering FAG's data on the record pertaining to total sales and actual entered values, its assessment rate methodology for entries of German- and Italian-origin bearings was the most accurate possible which met the needs and achieved the benefits of sampling analysis.

[Plaintiffs' motion is granted; case remanded.]

(Dated January 17, 1995)

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman and *Andrew B. Schroth)* for plaintiffs, FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti S.p.A., FAG (U.K.) Limited, Barden Corporation (U.K.) Limited, FAG Bearings Corporation and The Barden Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Dean A. Pinkert,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for defendant-intervenor, Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine, Myron A. Brilliant and *Robert A. Weaver)* for defendant-intervenor, The Torrington Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti S.p.A., FAG (U.K.) Limited, Barden Corporation (U.K.) Limited, FAG Bearings Corporation and The Barden Corporation

(collectively "FAG"), producers, exporters and importers of ball bearings, cylindrical roller bearings and spherical plain bearings, challenge the affirmative determination by the Department of Commerce, International Trade Administration ("Commerce"), in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992) with respect to Germany and Italy.

This action is before the Court on plaintiffs' motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of this Court.

BACKGROUND

On May 15, 1989, Commerce published the antidumping duty orders which underlie this action. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (1989); 54 Fed. Reg. 20,902 (1989) (France); 54 Fed. Reg. 20,903 (1989) (Italy); 54 Fed. Reg. 20,904 (1989) (Japan); 54 Fed. Reg. 20,906 (1989) (Romania); 54 Fed. Reg. 20,907 (1989 (Singapore and Sweden); 54 Fed. Reg. 20,909 (Thailand); *Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom*, 54 Fed. Reg. 20,910 (1989); 54 Fed. Reg. 20,911 (1989) (Thailand).

On June 28, July 19 and August 14, 1991, Commerce initiated administrative reviews of these orders with respect to various manufacturers and exporters for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 33,251 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 40,305 (1991).

On March 31, 1992, Commerce published its preliminary determinations in these second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 Fed. Reg. 10,859 (1992); 57 Fed. Reg. 10,862 (1992) (Federal Republic of Germany); 57 Fed. Reg. 10,865 (1992) (Italy); 57 Fed. Reg. 10,868 (1992) (Japan); 57 Fed. Reg. 10,871 (1992) (Romania); 57 Fed. Reg. 10,873 (1992) (Singapore); 57 Fed. Reg. 10,875 (1992) (Sweden) ; 57 Fed. Reg. 10,877 (1992) (Thailand); and 57 Fed. Reg. 10,878 (1992) (United Kingdom).

On June 24, 1992, Commerce published its consolidated Final Results. *Final Results*, 57 Fed. Reg. at 28,360. Amendments to the Final Results were published in *Antifriction Bearings (Other Than Tapered*

Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews, 57 Fed. Reg. 32,969 (1992) and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 59,080 (1992).

Against this background, FAG now moves pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record alleging that Commerce erroneously employed a methodology to calculate assessment rates for FAG'S U.S. entries of German- and Italian-origin bearings which used entered values of sampled sales rather than actual entered values, although actual entered values were the best information available. *Memorandum of Plaintiffs FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti S.p.A., and FAG Bearings Corporation in Support of FAG's Rule 56.2 Motion for Judgment Upon the Agency Record ("Plaintiffs' Brief")* at 1–23.

FAG alleges that Commerce's methodology for calculating assessment rates for FAG's U.S. entries of German- and Italian-origin bearings is unsupported by substantial evidence on the record and is not otherwise in accordance with law. *Plaintiffs' Brief* at 7.

Discussion

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

This Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

Assessment Rate Methodology for Entries of German and Italian Bearings:

Commerce's Final Results addressed the assessment rate methodology employed in this review, stating:

> For ESP [exporter's sales price] sales (sampled and non-sampled), we will divide the total PUDD[1] for the reviewed sales by

[1] The calculation of PUDD (potential uncollected dumping duties) is a two step process. First, the amount of PUDD is determined for each U.S. sale by multiplying the per unit dollar margin for that sale (i.e., the per unit difference between the United States price ("USP") and the foreign market value ("FMV")) by the total number of items sold. Second, the PUDD for each of the U.S. sales is added to arrive at a total PUDD (TOTPUDD).

the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margin against the entered Customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period.

Final Results, 57 Fed. Reg. at 28,362. Commerce explained:

> Section 751 of the Tariff Act requires that the Department calculate the amount by which the foreign market value exceeds the U.S. price and assess anti-dumping duties on the basis of that amount. However, there is nothing in the statute that dictates how the actual assessment rate is to be determined from that amount.
>
> In accordance with section 751, the Department calculated the amount of the difference between FMV and USP (the dumping margin) for all reported U.S. sales. We have calculated assessment rates based on the total of these differences * * *. In ESP cases, the Department generally cannot tie sales to entries and therefore cannot link the amount of antidumping duties determined for any specific sale to the specific entry or entries of that same merchandise. In addition, determination of antidumping duties for every entry based on the sale of that merchandise is impossible where dumping margins have been based on sampling, even if sales could be tied to entries. Therefore, in order to achieve a fair assessment of antidumping duties based on the difference between FMV and USP for sales reviewed, we have expressed this difference as a percentage of the entered value of those sales for each exporter/importer. We will direct the U.S. Customs Service to assess antidumping duties by applying that percentage to the entered value of each of that importer's entries of subject merchandise under the relevant order during the review period * * *. We calculated these assessment rates on the basis of the ratio of the total value of antidumping duties, which is equal to the total amount of dumping margins, calculated for the examined sales to the total entered value of the sales used to calculate those duties * * *.
>
> While the Department is aware that the entered value of sales during the POR [period of review] is not necessarily equal to the entered value of entries during the POR, use of entered value of sales as the basis of the assessment rate permits the Department to collect a reasonable approximation of the antidumping duties which would have been determined if the Department had reviewed those sales of merchandise actually entered during the POR.

Final Results, 57 Fed Reg. at 28,375.

FAG argues that Commerce erred in calculating its antidumping duty assessment rates for Italian and German product by dividing the total dumping duties due on sampled sales by the total entered values of those sampled sales, rather than by actual entered values from the POR. *Plaintiffs' Brief* at 2. As FAG had provided Commerce with actual entered values data for the entire POR, it objects to Commerce's use of sampling techniques to approximate entered values. *Id.* at 14. FAG contends that Commerce's failure to utilize its actual entered values was error as the actual values were the best evidence on the record for mak-

ing its assessment rate calculations. FAG contends that Commerce's failure to incorporate actual entered values in its calculations will result in the collection of antidumping duties on FAG's POR entries which will exceed the amount of TOTPUDD calculated on FAG's reported sales. *Id.* at 5, 17. Relying on 19 U.S.C. § 1673e(a)(1) (1988),[2] FAG contends that Commerce may not collect more than the TOTPUDD it has calculated pursuant to its POR sales analysis. *Plaintiffs' Brief* at 19.

In order to avoid this alleged over-collection, FAG suggests that it would have been more appropriate and accurate for Commerce "to annualize the sampled TOTPUDD (by the 8.69 multiplier actually utilized by [Commerce], *i.e.*, 6 sampled weeks × 8.69 = 52.14 weeks, or 1 year)" and then "divide this amount by *actual* entry totals provided by FAG for the entire period of review." *Id.* at 12. FAG suggests that the "resulting assessment rate could then be applied to actual POR entries to collect TOTPUDD." *Id.*

Furthermore, FAG argues that many of the sampled sales-specific entered values reported by FAG cannot be linked to the entries that will be liquidated as a result of this review as some of the sampled ESP sales were for goods which were entered prior to, and subsequent to, the POR. *Id.* at 16. Thus, FAG contends that it is improper to utilize the entered values of sales made during the POR to establish assessment rates which will be applied to liquidation of entries made during the POR as the entered values on the sales analyzed by Commerce are unrepresentative of the entered values on FAG's POR entries. *Id.* at 16, 18.

In addition, FAG points out that Commerce knew the total size of the universe from which the sample was drawn. *Plaintiffs' Brief* at 14.

Commerce, however, cites *Koyo Seiko Co. v. United States,* 16 CIT 539, 796 F. Supp. 1526 (1992), *vacated in part,* 16 CIT 788, 806 F. Supp. 1008 (1992), and *GMN Georg Muller Nurnberg AG v. United States,* 17 CIT ____, Slip Op. 93–54 (April 20, 1993) *("GMN"),* and argues that the assessment methodology it employed in this administrative review was identical to the methodology used in the first review and that methodology was judicially approved. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Defendant's Brief")* at 7.

Commerce explains that it sampled approximately 10 percent of all ESP sales for reviewed companies having more than 2,000 such transactions. *Id.* It asserts that the assessment rate methodology it chose was the most accurate rate which still permitted Commerce the benefits of sampling. *Id.* at 9.

Defendant-intervenor, Federal-Mogul Corporation, a U.S. manufacturer of antifriction bearings ("AFBs"), argues that FAG's preferred alternative assessment methodology would empower FAG to influence

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[2] **19 U.S.C. § 1673e. Assessment of duty.**

(a) Publication of antidumping duty order

[T]he administering authority shall publish an antidumping duty order which—

(1) directs customs officers to assess an anti-dumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise * * *

and manipulate its assessment rates through inventory traffic control. *Response of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record* at 2.

Defendant-intervenor, The Torrington Company, a U.S. producer of AFBs, asserts that there is no basis on the administrative record for concluding that FAG's recommended assessment rate method would yield more accurate results than Commerce's method. *Response of The Torrington Company, Defendant-Intervenor, in Opposition to Motion of FAG Kugelfischer Georg Schafer, KGaA, et al., Plaintiffs, for Judgment Upon the Agency Record* at 5.

Title 19, United States Code, section 1673e(a)(1) pertains to the application of assessment rates by the Customs Service in furtherance of Commerce's assessment determinations. The only statutory provision which specifically refers to the actual assessment of antidumping duties appears in 19 U.S.C. § 1675(a)(1)(B) (1988). This provision provides that Commerce shall "review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty." Paragraph 2 of section 1675(a), explains that the amount by which the FMV exceeds the USP "shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination." 19 U.S.C. § 1675(a)(2) (1988). In the case at bar, as required by statute, Commerce calculated dumping margins based on the difference between FMV and USP and this differential was the basis for the assessment of antidumping duties. Commerce used the entered value only to allocate, to each entry, a portion of the antidumping duties due.

The reviews of German- and Italian-origin product were among a total of nine reviews occurring simultaneously and covering sixty-three manufacturers/exporters. *Final Results,* 57 Fed. Reg. at 28,360. Under the circumstances, for companies with enormous volume of ESP transactions, it was not unreasonable for Commerce to utilize the sampling techniques which are authorized by 19 U.S.C. § 1677f–1 (1988). In addition, the information relating to FAG's sales which Commerce used in its sampling analysis was supplied by FAG.

In previously sustaining Commerce's current assessment methodology, the Court stated:

> It is well-established that Commerce is granted tremendous deference in selecting the appropriate methodology * * *. As long as Commerce's "decision is reasonable, then Commerce has acted within its authority even if another alternative is more reasonable." *See Koyo Seiko Co. v. United States,* 16 CIT ____, ____, 796 F. Supp. 517, 523 (1992) * * *.
>
> In this case Commerce's methodology is a reasonable means of achieving the end result and, therefore, Commerce's actions are justified and in accordance with law.

Koyo Seiko Co., 16 CIT at 541–42, 796 F. Supp. at 1529; *see also GMN Georg Muller Nurnberg AG,* 17 CIT at ____, Slip Op. 93–54 at 5. In *GMN,* however, the Court stated:

> Plaintiff claims that the "better" way for Commerce to have acted would have been for it to calculate the assessment rates based on the ratio of total dumping duties owed to the *total* entered value of the subject merchandise during the period of review. Commerce, however, could not have followed this method for two reasons. First, Commerce was unaware of the size of the universe from which the sample was drawn. Second, Commerce did not have information about the total entered value of units entered during the review period. Thus, Commerce was forced to use sampling techniques and use the sales data they had.

GMN George Muller Nurnberg AG, 17 CIT at ___, Slip Op. 93–54 at 4–5. In this case, Commerce states, "[w]hile Commerce had FAG's entered values for the merchandise entered during the review period, Commerce was not aware of the size of the universe from which the sample was drawn." *Defendant's Brief* at 11.

Commerce also contends that its assessment methodology assumed a constant rate of dumping throughout the POR and did not predetermine a total amount of duties to be collected. *Id.* at 11–12. Commerce points out that, in contrast, FAG's recommended method assumes a constant rate of sales made during the period of review, thus generating what can be characterized as an estimated TOTPUDD. *Id.* at 11. Commerce further contends that it could not avoid a simplifying assumption about the rate of dumping of all entries during the POR, stating:

> A theoretician might hypothesize that Commerce could have taken the sample PUDD and multiplied it by a number calculated to compensate for the size of the sample relative to the size of the universe of sales from which the sample was drawn. By dividing this number by the total entered value of units entered during the period, one could derive an assessment rate that embodies no assumptions regarding entries that were not sold during the period of review. *However, Commerce could not follow this more refined method because it did not know the size of the universe from which the sample was drawn and could not determine that size without imposing reporting requirements that would have defeated the purpose of sampling.*

Defendant's Brief at 9 (emphasis added). Commerce also argues, "[i]f the sample was drawn from **sales** during the period of review, then information concerning **entries** during the period of review could not possibly assist Commerce in determining the universe from which the sample sales were drawn." *Id.* at 11. However, the administrative record contains FAG's data on actual entered values, as well as on total sales, for German- and Italian-origin product. *Italy AR (Pub.) Doc. 57 at 1338; Germany AR (Pub.) Doc. 194, Exhibit 6.* Hence, there is a discrepancy between Commerce's statements and the contents of the administrative record.

In light of the question that *GMN* leaves unanswered about the propriety of Commerce's current methodology in a situation where Commerce knows both the size of the universe from which it draws its

sample and the total entered value of entries during the POR, the Court remands this case to Commerce. Commerce is to determine whether, taking into account FAG's data on total sales and actual entered values, its assessment rate methodology for entries of German- and Italian-origin bearings was the most accurate possible which met the needs and achieved the benefits of sampling analysis, such that the methodology employed in this review was a reasonable exercise of agency discretion.

CONCLUSION

FAG's motion for judgment upon the agency record is granted to the extent that this case is remanded to Commerce to determine whether, considering FAG's data on the record pertaining to total sales and actual entered values, its assessment rate methodology for entries of German- and Italian-origin bearings was the most accurate possible which met the needs and achieved the benefits of sampling analysis.

The remand results are due within ninety (90) days of the date that this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter; and any rebuttal comments are due within fifteen (15) days of the date that responses or comments are due.

PUBLIC VERSION

(Slip Op. 95–5)

CHR. BJELLAND SEAFOODS A/S (NOW NORWEGIAN SALMON A/S), ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND COALITION FOR FAIR ATLANTIC SALMON TRADE, DEFENDANT-INTERVENOR

Court No. 91–05–00364

[Final affirmative injury determination, resulting from remand to the U.S. International Trade Commission, is sustained. Final countervailing duty determination of the U.S. Department of Commerce, International Trade Administration ("Commerce"), is affirmed. Plaintiffs' challenges to Commerce's final antidumping duty determination and order are dismissed. Judgment entered for defendants.]

(Dated January 18, 1995)

Mudge Rose Guthrie Alexander & Ferdon (N. David Palmeter, Jeffrey S. Neeley), for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer);* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Robert J. Heilferty),* of counsel, for defendant.

Lyn M. Schlitt, General Counsel; *James A. Toupin,* Assistant General Counsel, United States International Trade Commission *(Marc A. Bernstein),* for defendant.

Collier, Shannon, Rill & Scott (Michael J. Coursey, Robin H. Gilbert), for defendant-intervenor.

MEMORANDUM OPINION

GOLDBERG, *Judge:* Plaintiffs, Norwegian Salmon A/S *et al.*, commenced this action under section 516A of the Tariff Act of 1930, challenging: the final affirmative injury determination made by the U.S. International Trade Commission ("ITC") in *Fresh and Chilled Atlantic Salmon from Norway,* USITC Pub. No. 2371, Inv. Nos. 701–TA–302 and 731–TA–454 (Final) (Apr. 1991); the final affirmative antidumping ("AD") determination made by the U.S. Department of Commerce, International Trade Administration ("Commerce") in *Fresh and Chilled Atlantic Salmon from Norway,* 56 Fed. Reg. 7661 (Feb. 25, 1991); Commerce's final affirmative countervailing duty ("CVD") determination in *Fresh and Chilled Atlantic Salmon from Norway,* 56 Fed. Reg. 7678 (Feb. 25, 1991); and the antidumping and countervailing duty orders entered therefrom. By order dated October 23, 1992, the court remanded this action with instructions that the ITC reevaluate its material injury determination in accordance with the court's opinion. *Chr. Bjelland Seafoods A/S (Now Norwegian Salmon A/S) v. United States,* 16 CIT 945 (1992) *("Salmon I").* The court reserved decision on its review of plaintiffs' challenges to Commerce's AD and CVD determinations, pending the results of remand to the ITC. *Salmon I,* 16 CIT at 946.

The ITC issued its final affirmative injury determination on April 1, 1991 *("April 1991 ITC Determination").* Pursuant to this court's order of remand, the ITC issued its remand determination on December 22, 1992. *Fresh and Chilled Atlantic Salmon From Norway,* USITC Pub. No. 2589, Inv. Nos. 701–TA–302 and 731–TA–454 (Final) (Remand) (Dec. 1992) *("ITC Remand Results").* By a three to three vote, the ITC reaffirmed its affirmative finding of material injury.[1] Plaintiffs now challenge the ITC's remand determination. The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

I. BACKGROUND

The factual predicate underlying this action is detailed in the court's original memorandum opinion. *Salmon I,* 16 CIT at 946–48. Briefly, the product covered by the contested orders is whole or nearly-whole Atlantic salmon that is typically, but not necessarily, marketed gutted, bled, and cleaned, with the head on, and packed in fresh-water ice ("Norwegian salmon"). The challenged orders do not cover fillets, steaks, or other cuts of Atlantic salmon, or frozen, canned, smoked or otherwise processed Atlantic salmon. *Initiation of Antidumping Duty Investigation: Fresh and Chilled Atlantic Salmon from Norway,* 55 Fed. Reg. 11,418, 11,419 (Mar. 28, 1990); *Initiation of Countervailing Duty Investigation: Fresh and Chilled Atlantic Salmon from Norway,* 55 Fed. Reg. 11,423 (Mar. 28, 1990).

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[1] When the Commissioners on the ITC are evenly divided as to whether a determination should be affirmative or negative, the ITC is deemed to have made an affirmative determination. 19 U.S.C. § 1677(11) (1988).

The Atlantic salmon industry operates on a three year production cycle. Salmon eggs are hatched and the salmon are grown through their fry and parr stages in fresh water tanks; after approximately eighteen months, the salmon "smoltify." The smolt are placed in large ocean pens or cages, where they grow to market size adult fish over a period of eighteen to twenty-four months. Harvesting begins in late summer or early fall and continues until the following late spring or early summer.

II. DISCUSSION

In this review, the court is charged to hold unlawful any agency determination that is not supported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is more than a mere scintilla; it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rhone Poulenc, S.A. v. United States,* 8 CIT 47, 50, 592 F. Supp. 1318, 1321 (1984) (citation omitted). The court will thus sustain agency determinations if they are reasonable and supported by the record as a whole, even though portions of the record may detract from the substantiality of the evidence. *Atlantic Sugar, Ltd. v. United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1563 (1984).

The court must accord substantial weight to an agency's interpretation of the statute it administers. *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). This deference, however, "is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361, 368 (1986). Thus, the court should not defer to an agency's interpretation where "there are compelling indications that that interpretation is incorrect." *Borlem S.A.-Empreedimentos Industriais v. United States,* 8 Fed. Cir. (T) 164, 168, 913 F.2d 933, 937 (1990). Neither should the court defer to an agency's determination that is based on inadequate analysis. *USX Corp. v. United States,* 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987).

A. *The ITC's Final Affirmative Injury Determination on Remand:*

In an AD or CVD investigation, the ITC is charged with determining whether an industry in the United States is either materially injured, or threatened with material injury, by reason of subject imports.[2] 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1) (1988). There are two components to an affirmative determination: a finding of present material injury or a

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[2] According to statute, in order to make this determination, the ITC:

> (i) shall consider—
>
> (I) the volume of imports of the merchandise which is the subject of the investigation,
>
> (II) the effect of imports of that merchandise on prices in the United States for like products, * * *
>
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and
>
> (ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B) (1988).

threat thereof, and a finding of causation. Plaintiffs challenge the ITC's remand determination as to both components.[3]

The ITC found that the domestic industry experienced present material injury based upon: declining smolt shipments; marginal growth in the capacity utilization rate for smolt; lower average unit value of salmon shipments; and poor financial indicators. *ITC Remand Results* at 6–8. Although the ITC's reliance upon average unit value data is misplaced in this case,[4] the court finds that the administrative record does contain substantial evidence to support a finding of present material injury.

The ITC plurality also determined that subject imports are a cause of present material injury based upon: the absolute volume of subject imports during the POI; the increasing volume of subject imports from 1987–1989; early record evidence of price suppression and depression; and, record evidence of actual and potential negative effects on the domestic industry. The court finds that the plurality's conclusions regarding the significance of both the 1987–1989 increase in import volume, and the early price effects of subject imports, are unsupported by substantial evidence in the record; nevertheless, because the plurality's conclusions regarding the significance of both absolute volume data and evidence of the adverse impact of subject imports on the domestic industry are supported by substantial record evidence and in accordance with law, the court sustains the plurality's affirmative determination upon remand.[5] The court will examine the plurality's analysis of each of the statutory factors in turn.

1. *Volume of Subject Imports:*

In evaluating the volume factor, the ITC must consider whether the volume of subject imports, or any increase in such volume, is significant. 19 U.S.C. § 1677(7)(C)(i). The ITC determined that subject imports amounted to 7.6 million kilograms in 1987; 8.9 million kilograms in 1988; 11.4 million kilograms in 1989; and 7.7 million kilograms in 1990. *April 1991 ITC Determination* at A–43. In its final determination, the ITC placed great emphasis on the 1987–1989 volume data, but assigned "less weight to the recent decline in imports in 1990 because it appear[ed] to be largely the result of the filing of the petition and/or the imposition of provisional * * * duties."[6] *Id.* at 17. Plaintiffs argued that the decline in Norwegian imports in 1990 was not attributable to the presumptive effect of the imposition of provisional CVD and AD duties, but rather to the appreciation of the Norwegian kroner against the U.S.

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[3] None of the Commissioners made an affirmative threat determination, in either the *April 1991 ITC Determination* or upon remand. The court's review is thus limited to the ITC's affirmative present material injury determination.

[4] *See infra* part II.A.1.

[5] *Cf. Iwatsu Elec. Co. v. United States*, 15 CIT 44, 51, 758 F. Supp. 1506, 1512–13 (1991) (questioning whether causation may ever be proven by volume data alone).

[6] A provisional CVD, equal to 0.77 Norwegian kroner ("NOK") per kilogram, was imposed in late June 1990. *Fresh and Chilled Atlantic Salmon from Norway*, 55 Fed. Reg. 26,727, 26,732 (June 29, 1990). Provisional AD duties, which ranged from 1.6 percent to 4.9 percent *ad valorem* for those Norwegian firms found to be engaging in more than *de minimis* LTFV sales, were imposed in early October 1990. *Fresh and Chilled Atlantic Salmon from Norway*, 55 Fed. Reg. 40,418, 40,421 (Oct. 3, 1990).

dollar. The appreciation of an exporting country's currency against that of the importing country will result in a lower volume of exports to the extent that such currency appreciation is manifested in a price increase, which in turn depresses consumption. The ITC plurality nevertheless found the volume of subject imports, and particularly the increase reflected in the 1987–1989 volume data, to be significant. *Id.* at 18.

Upon review, the court determined that the ITC had failed to adequately explain its conclusion that the 1990 decline in volume was not due to appreciation of the Norwegian kroner. *Salmon I,* 16 CIT at 952. The court also found that the ITC had failed to address record evidence of an increase in Norwegian imports to the European Community ("EC"), despite the fact that similar AD proceedings were underway there at about the same time. *Id.* Finally, the court faulted the ITC for not discussing the experience of the Norwegian exporter Sea Star International ("Sea Star") during a period in which its export shipments to the United States were not subject to provisional duties. *Id.* The court therefore ordered a remand, directing the ITC to address these deficiencies in a reevaluation of its volume determination.

Upon remand, the ITC continued "to accord little weight to the sharp decline in the volume of subject imports in the second half of 1990, because [the ITC found] it was in significant part attributable to the pendency of [the AD and CVD] investigations." *ITC Remand Results* at 14. The court finds that the ITC's position is unsustainable in this regard because it is not supported by substantial evidence in the record. There are four elements to the court's analysis of this issue.

First, the court notes that, in concluding that the decline in the volume of salmon imports from Norway in 1990 was not related to the decline in the value of the dollar relative to the kroner, the ITC based its analysis upon average unit value data. The ITC used average unit value statistics compiled by the Customs Service as a proxy for the merchandise's transaction value[7] in a comparison with prices charged by U.S. wholesalers of the subject imports.[8] During the period May 1990 through September 1990, the kroner appreciated 6.1 percent against the dollar.[9] *ITC Remand Results* at 11. During the same period, the average unit value of subject imports increased by 3.9 percent[10] while the prices charged by U.S. importers of Norwegian salmon increased by

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[7] Transaction value is defined as "the Price actually paid or payable for the merchandise when sold for exportation to the United States" plus certain charges or costs not otherwise included in the price actually paid. 19 U.S.C. § 1401a(b)(1) (1988).

[8] *Defendant United States International Trade Commission's Opposition To Plaintiff's Motion For Judgment Upon The Agency Record On Remand* at 18 (*"ITC Brief on Remand"*).

[9] Commissioner Brunsdale noted that between January and December 1990, the Norwegian kroner appreciated 15 percent against the U.S. dollar, much of that appreciation occurring in the latter half of the year. *April 1991 ITC Determination* at 34 (Acting Chairman Brunsdale, dissenting).

[10] In support of this figure, the ITC refers the court to *Administrative Record ("AR") List 2,* Doc. No. 26C. Plaintiffs assert that this document does not constitute record evidence of the 3.9 percent figure cited by the ITC because it does not include average unit values. Plaintiffs fail to note, however, that Document No. 26C contains both total quantity and total value import data. In May 1990, imports of Norwegian salmon to the United States amounted to | | kg, at a total value of | | dollars. This results in an average unit value of | | per kilogram. In September 1990, imports of the subject merchandise amounted to | | kg, at a total value of | | dollars. This results in an average unit value of | | per kilogram, and reflects a 3.9 percent increase over the figure for May 1990.

14.3 percent for 2–3 kg salmon; 14.0 percent for 3–4 kg salmon; and 15.0 percent for 4–5 kg salmon. *Id.* at 11–12. The ITC concluded that because Norwegian exporters' prices were increasing at a lesser rate than the rate of currency appreciation, while the prices charged by U.S. importers were increasing at a rate greater than that of the kroner's appreciation against the dollar, such appreciation was not the cause of the sharp decline in volume. *Id.* at 12.

The court finds the ITC's analysis deficient in one major respect; specifically, the average unit value data relied upon by the ITC fails to account for shifts in the distribution of subject imports among different weight classifications. The ITC acknowledges that masked shifts in product mix undermine the reliability of the average unit value data. *ITC Remand Results* at 11 n.5O. The ITC asserts, however, that it "took special precautions to guard against the average unit value statistic being skewed by changes in product mix [ ]" by limiting the scope of its analysis to the period May through September 1990. *ITC Brief on Remand* at 18. To establish the sufficiency of its lone precautionary measure, the ITC relies upon *AR List 2R*, Doc. No. 29, for the proposition that subject import product mix did not materially change during this period. *Id.* at 18–19. As this document clearly indicates, however, aggregate monthly shifts in product mix (measured in absolute terms) averaged approximately [ ] percent for the period May through September 1990; moreover, these shifts generated a downward bias in average unit value data which is unaccounted for by the ITC plurality in its remand determination.[11] The plurality's failure to adequately address this bias is inexplicable given that the administrative record contains an internal ITC memorandum which recognizes the legitimacy of such a concern.[12] The *ITC Internal Memorandum* notes that [ ]. The memorandum further questions the use of subject import average unit value data by noting that [ ]. This too was left unaddressed by the ITC plurality. In light of these significant omissions, a review of the administrative record leads the court to conclude that the plurality's decision to employ average unit values for the period May through September 1990 as an accurate proxy for prices paid by U.S. importers of Norwegian salmon is unsupported by substantial evidence.

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[11] The following summary regarding imports of salmon from Norway is drawn from information contained in *AR List 2R*, Doc. 29:

Monthly interval	Changes in distribution of imports (percent)			Aggregate absolute shift (percent)
	4–6 lbs.	6–9 lbs.	9–11 lbs.	
May to June 1990.	[ ]	[ ]	[ ]	[ ]
June to July 1990.	[ ]	[ ]	[ ]	[ ]
July to August 1990.	[ ]	[ ]	[ ]	[ ]
August to Sept. 1990.	[ ]	[ ]	[ ]	[ ]
May to Sept. 1990.	[ ]	[ ]	[ ]	

The summary indicates that during the period May through September 1990, [ ]. This relative shift to lower priced imports results in a downward bias in average unit value data over this period. This shift is not surprising given the pricing pressure attributable to appreciation of the Norwegian kroner during 1990.

[12] *AR List 2R*, Doc. No. 30 (*"ITC Internal Memorandum"*) is an internal memorandum from the Acting Chief of the Applied Economics Division of the ITC to the Commission.

Second, after rejecting kroner appreciation as the principal cause of the price increases implemented by U.S. importers during 1990, the ITC plurality concluded that the true impetus was the posting of bonds necessitated by the imposition of a provisional CVD in late June 1990. *ITC Remand Results* at 12. As a result of Commerce's preliminary CVD determination, beginning on June 29, 1990, importers were required to post a bond sufficient to cover a maximum potential CVD liability of 2.45 percent *ad valorem.* 55 Fed. Reg. 26,727 (June 29, 1990). From July through September 1990, this was the sole remedial duty imposed upon the subject imports. *See* 56 Fed. Reg. 7678 (Feb. 25, 1991); 55 Fed. Reg. 40,418 (Oct. 3, 1990). During this period, monthly wholesale market prices for Norwegian salmon increased by 13.39 percent for 2–3 kg salmon; 10.86 percent for 3–4 kg salmon; and 11.76 percent for 4–5 kg salmon.[13] The plurality's analysis thus leaves price increases of 10.94 percent for 2–3 kg salmon; 8.41 percent for 3–4 kg salmon; and 9.31 percent for 4–5 kg salmon, unaccounted for and attributable to something else. In other words, over seventy-five percent of the price increases which occurred during the period July through September 1990 are attributable to something other than Commerce's preliminary CVD determination.[14] The bonding requirement thus hardly merits the plurality's characterization as the "principal reason" for the disparity between increases in the average unit value of the subject imports and U.S. importers' price increases. *ITC Remand Results* at 12.

To buttress its conclusion, however, the plurality states that "[c]ontemporaneous reports in trade publications indicate that some U.S. importers were moving away from handling Norwegian salmon because of administrative and financial burdens associated with the posting of bonds." *Id.* The only record evidence cited in support of this statement is a single press report published in June 1990.[15] The report states, in pertinent part: "There appears to be some movement—mostly by smaller players—away from Norwegian fish because of the 'logistical hassles' involved with the bond." (Emphasis omitted). The record is devoid of subsequent press reports which address these associated "hassles." This lone excerpt from an industry newsletter, which was published four days *prior* to the Federal Register notice effectuating the bonding requirement, and which is unsubstantiated by *any* corroborating evidence in the record, does not amount to substantial evidence that the bonding requirement caused a reduction in the volume of Norwe-

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[13] These figures are derived from public information summarized in *AR List 2R*, Doc. No. 28, Appendix 12, which is contained in the administrative record on remand.

[14] Even if the 3.9 percent increase in average unit values which occurred between May and September 1990 is taken into account, over half of the increase in U.S. wholesalers' prices still remains unaccounted for.

[15] *Seafood Trend* (June 25, 1990). This report, located in *AR List 1* of the administrative record, is identified as Doc. No. 188(Y)(19). The court notes that in its response brief following remand, defendant states that this report "is far from the only material in the record that supported the Commission's conclusion." *ITC Brief on Remand* at 24. Defendant then proceeds to refer the court to monthly import statistics compiled by the Customs Service as that additional evidence. The cited statistics show "that there was a significant decline in subject import volume levels" during the latter half of 1990. *Id.* at 25. But this does not constitute record evidence of the *cause* of the decline in volume; rather, it merely evinces the fact that such a decline did occur, thus begging the question as to what specifically precipitated the decline.

gian salmon exports to the United States. Moreover, this excerpt provides absolutely no evidence of the claimed financial burdens relied upon by the ITC plurality in its remand determination. For these reasons, the court concludes that the ITC's determination that the CVD bonding requirement was the principal cause of U.S. importers' 1990 price increases is unsupported by substantial evidence in the record.

Third, the court is unable to sustain the ITC plurality's conclusion regarding the experience of one Norwegian exporter in particular, i.e. Sea Star. During the period November 1990 through January 1991, unlike all other Norwegian exporters, Sea Star's export shipments to the United States were not subject to any provisional duties.[16] Despite its unique status as the sole exporter of Norwegian salmon free of provisional CVD and AD duties, Sea Star's exports to the United States during this period plummeted.[17] Clearly, this decline in export volume cannot be attributed to the imposition of provisional duties which did not apply to Sea Star. The plurality dismissed such record evidence, however, stating that "[a]n examination of Sea Star's U.S. export data indicates that its export decline does not track those of other Norwegian producers and cannot be attributed to the kroner appreciation." *ITC Remand Results* at 13. The plurality justifies its position merely by noting that [ ]. Standing alone, such data simply fail to address the precipitous decline in Sea Star's exports during the relevant three month period, i.e. November 1990 through January 1991. What is significant here is that Sea Star's exports did track those of other Norwegian exporters during a period in which Sea Star alone had unencumbered access to the U.S. market. The plurality's remand determination fails to provide an adequate explanation of this phenomenon, nor is it explained by record evidence of provisional CVD and AD duties.[18] As a result, the court finds that the plurality's conclusion that Sea Star's export volume decline cannot be attributed to kroner appreciation is unsupported by substantial evidence in the record.

Fourth, the ITC plurality found that "[t]he fact that the volume of Norwegian exports to the [EC] did not similarly decrease during the pendency of an antidumping investigation there between December 1989 and March 1991 does not detract from [its] conclusion [that the decline in exports of Norwegian salmon to the United States was not principally a function of kroner appreciation]." *ITC Remand Results* at 13. The plurality based its finding on the fact that, in contrast to the instant U.S. investigations, provisional duties were not imposed in the

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[16] Sea Star was the one Norwegian exporter that was preliminarily found by Commerce not to be engaging in more than *de minimis* LTFV sales. 55 Fed. Reg. 40,418, 40,421 (Oct. 3, 1990). All other Norwegian exporters were subject to provisional AD duties, effective October 3, 1990. *Id.* With regard to the provisional CVD, Commerce terminated suspension of liquidation on October 28, 1990 in accordance with the GATT Subsidies Code, thereby eliminating the CVD bonding requirement. 56 Fed. Reg. 7678 (Feb. 25, 1991)

[17] Compared to the same month during the previous year, Sea Star's exports to the United States [ ]. *AR List 2,* Doc. No. 10, at 63 (*"Norwegian Respondents' Prehearing Brief"*).

[18] The plurality also observes that Sea Star was one of eight exporters examined by Commerce, and accounted for less than of total export volume for the portion of the POI for which complete data are available. *ITC Remand Results* at 13–14. But this observation has nothing to do with why Sea Star's exports declined from November 1990 through January 1991. Indeed, the plurality's remand determination fails to offer any explanation for Sea Star's export volume decline, let alone for why it "cannot" be traced to appreciation of the Norwegian kroner.

EC investigation and therefore could not have acted as a deterrent to EC importers of Norwegian salmon. *Id.* This distinction notwithstanding, the court is unable to sustain the plurality's treatment of this issue. As noted, the plurality's analysis leaves over 75 percent of the price increases implemented by U.S. importers of Norwegian salmon between July and September 1990 unaccounted for, at a time when the kroner was appreciating sharply against the U.S. dollar.[19] During the pendency of the EC's AD investigation between December 1989 and March 1991, in the absence of any provisional duties, exports of Norwegian salmon to the EC increased by 20.4 percent while the kroner either maintained a steady exchange rate or even depreciated slightly against the currencies of its major customers in the EC.[20] The plurality thus dismissed the EC data solely on the basis of provisional U.S. duties which represent only a fraction of the price increases implemented by U.S. importers, and despite the fact that Norwegian salmon became substantially more expensive for U.S. customers in comparison to EC customers. This treatment of the EC data is simply unsupported by substantial evidence in the record.

As the court recognized in its first opinion, plaintiffs have rebutted the presumption that the 1990 decline in exports of Norwegian salmon to the United States was due to the imposition of provisional CVD and AD duties. *Salmon I,* 16 CIT at 951–52. The court finds, for the foregoing reasons, that the ITC has failed to support with substantial record evidence its remand determination that this volume decline is not significant and merits diminished weight. Consequently, in light of this most recent record evidence, the court finds that the ITC's conclusion that the 1987–1989 increase in volume is significant for purposes of its present material injury inquiry is unsupported by substantial evidence and thus cannot be sustained.[21]

2. *Price Effects of Subject Imports:*

In evaluating the effects of subject imports on prices, the ITC is instructed to consider whether there has been significant price underselling of the imported merchandise in the United States, and whether subject imports have caused significant price suppression or depression for like product in the U.S. market. 19 U.S.C. § 1677(7)(C)(ii) (1988). The ITC originally determined that subject imports significantly

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[19] The real value of the Norwegian kroner appreciated by over 6 percent against the U.S. dollar between June and September 1990. *April 1991 ITC Determination* at A–64, Table 22.

[20] *ITC Remand Results (Dissent)* at 2 n.4 (Vice Chairman Watson and Commissioners Brunsdale and Crawford, dissenting); *April 1991 ITC Determination* at 34 (Acting Chairman Brunsdale, dissenting). In 1990, Norway's five largest markets in the EC, by volume, were: France (30.3%); Denmark (20.2%); Spain (9.3%); Germany (9.2%); and the United States (8.1%). *Plaintiffs' Reply To Defendant's And Defendant-Intervenor's Opposition To Plaintiffs' Motion For Judgment Upon The Agency Record On Remand* at 14 n.26. From June to November 1990, the kroner depreciated 1.6 percent against the French franc. Id. n.27.

[21] Apart from its treatment of the decline in import volume, the ITC also concluded that the absolute volume of imports was significant throughout the POI for purposes of establishing a causal link to the depressed condition of the U.S. industry. *ITC Remand Results* at 14. Plaintiffs agree that "even at their sharply reduced volume, Norwegian imports were significant and, indeed, at all relevant times, supplied a larger share of the market than the domestic product." *Plaintiffs' Memorandum In Support Of Motion For Judgment Upon The Agency Record On Remand ("Plaintiffs' Brief on Remand")* at 19. The court finds that this aspect of the ITC's determination is supported by substantial evidence in the record.

depressed and suppressed prices for domestic like product. *April 1991 ITC Determination* at 20. In reaffirming its affirmative determination upon remand, the ITC plurality reiterated its belief that "the most current reliable import pricing information is for the period ending June 1990." *ITC Remand Results* at 16. The plurality therefore declined to accord the post-June 1990 data any probative value. As the court has previously discussed, however, this decision is unsupported by substantial evidence in the record. The court will thus consider the entirety of the record in its review of the plurality's conclusions regarding price effects.[22]

The ITC plurality based its finding of price depression and suppression upon: (1) the significant volume of subject imports during 1989 and the first half of 1990; (2) the fact that, due to conditions of competition, domestic producers could not withhold product from the market; (3) the fact that domestic like product and Norwegian salmon are highly substitutable; and, (4) the fact that during 1989 and the first half of 1990, prices for both subject imports and domestic like product, which generally moved in tandem, evince a downward trend. *ITC Brief on Remand*

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[22] In remanding this matter to the ITC, the court noted that the Commission is responsible for determining whether subject imports are causing a domestic industry to suffer *present* material injury. *Salmon I*, 16 CIT at 952–54. The court did no more than accord a plain reading to 19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1). *See Salmon I*, 16 CIT at 952–54. Upon remand, several of the Commissioners expressed reservations regarding the court's discussion of the present material injury inquiry. *ITC Remand Results* at 15 n.61, 16 n.64; *ITC Remand Results (Dissent)* at 11–13 & nn.32–33 (Vice Chairman Watson and Commissioners Brunsdale and Crawford, dissenting). These concerns warrant further clarification.

As the ITC plurality observed, "the Commission's inquiry requires a dynamic analysis over a period of time of both the condition of the domestic industry and the effects of imports upon that industry." *ITC Remand Results* at 16 n.64. It is of course well within the ITC's discretion to discount or dismiss incomplete or unreliable data. A determination of present material injury does not require the ITC to collect and examine data up until vote day, or to focus exclusively upon data most nearly contemporaneous with vote day, without considering whether the reliability of such data is suspect. Indeed, as the court noted, provisional AD or CVD orders may be presumed to distort the meaningfulness of subsequent observable data. *See, e.g., Matsushita Elec. Indus. Co. v. United States*, 6 CIT 25, 34, 569 F. Supp. 853, 862 (1983), *rev'd on other grounds*, 3 Fed. Cir. (T) 44, 750 F.2d 927 (1984). As the court has explained, however, substantial record evidence clearly refutes its determination of present material injury upon inferences about a period most nearly contemporaneous with vote day, during which time data cannot, as a practical matter, be collected.

In making a present material injury determination, the ITC is, however, required to account for reliable record evidence of changed circumstances which occur between the date of the petition and vote day and which impact a present material injury inquiry. Accounting for changed circumstances in an assessment of whether a domestic industry is experiencing "present" material injury accords with the purely remedial purpose of our trade laws. *See Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) 101, 108–09, 901 F.2d 1097, 1103 (1990) (citing S. Rep. No. 249, 96th Cong., 1st Sess. 39, 87 (1979)). As this court has recognized, the AD and CVD statutes are not penal, retaliatory, or compensatory. *See, e.g., National Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 558, 779 F. Supp. 1364, 1372 (1991) (citations omitted); *National Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 774, 696 F. Supp. 642, 645 (1988) (citation omitted). Rather, they are intended to equalize particular aspects of future competitive conditions between foreign exporters to the United States and the domestic industry. *Imbert Imports, Inc. v. United States*, 67 Cust. Ct. 569, 576 n.10, 331 F. Supp. 1400, 1406 n.10 (1971) (citation omitted), *aff'd*, 60 CCPA 123, C.A.D. 1094, 475 F.2d 1189 (1973). Thus, an affirmative determination can only be made if, upon a review of the entirety of the record, there is substantial evidence to support a conclusion that subject imports are a cause of present material injury such that the imposition of remedial duties is warranted to afford prospective relief to the domestic industry which would otherwise experience further injury due to the continued importation of unfairly traded merchandise.

Although the entirety of the administrative record must be evaluated, a finding of "present" injury must reference a time period which is as nearly contemporaneous to vote day as possible and for which reliable record evidence is available. This is not to say that the ITC may not exercise its discretion in choosing the most appropriate time frame for its investigation. *See Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 126–27, 630 F. Supp. 354, 359 (1986). Nor does the court mean to preclude the ITC from addressing the possibility that negative effects of a present material injury are latent. *Saarstahl AG v. United States*, Consol. Court No. 93–04–00219–S, Slip Op. 94–103 at 11 (CIT June 24, 1994). The court merely observes that, within the time frame established by the ITC for its investigation, relatively older information serves to provide a historical frame of reference against which a "present" (i.e. as recent to vote day as possible, given the limitations of the collected data) material injury determination is to be made, and without which any assessment of the extent of changed circumstances would be impossible. Indeed, the ITC has previously acknowledged as much. *See 12-Volt Motorcycle Batteries From Taiwan*, USITC Pub. No. 2213 at 11, Inv. No. 731–TA–238 (Final) (Aug. 1989) ("[T]he time period for which we collect data—three years in most cases—merely serves as a historical frame of reference for an analysis of the current condition of the domestic industry at the time of the Commission's determination.").

at 31. The court finds that the four points cited by the ITC plurality do not constitute substantial record evidence that subject imports depressed and suppressed prices for domestic like product sufficient to support an affirmative *present* material injury determination; rather, subsequent record evidence left unaddressed by the ITC plurality simply refutes all inferences that subject imports are a "present" cause of price depression and suppression in the domestic market.

As Acting Chairman Brunsdale aptly noted, "[t]he single most important fact in this case is that, even as the price of Norwegian fish became higher and higher in 1990, the price of domestically produced fish did not similarly increase. Instead, imports of Atlantic salmon from other nations skyrocketed." *April 1991 ITC Determination* at 28–29 (Acting Chairman Brunsdale, dissenting). The ITC plurality, however, fails to provide an adequate explanation for why domestic producers sold like product at an increasing discount relative to decreasing volumes[23] of imports of Norwegian salmon throughout 1990.[24] Nor does the plurality explain, after taking into account the imposition of provisional duties, how increasingly expensive subject imports depressed and suppressed prices for domestic like product so as to cause present material injury. With these concerns in mind, the court turns to the analysis of price effects found in Acting Chairman Brunsdale's original dissenting opin-

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[23] In 1989, subject imports averaged over 900,000 kilograms per month. In January 1990, subject import volume declined to approximately 779,000 kilograms, rising again to approximately 977,000 kilograms by April 1990. Thereafter, monthly subject import volume declined rapidly to 188,000 kilograms by the end of December 1990. As of April 1, 1991, almost no Norwegian salmon was entering the U.S. market. *ITC Remand Results (Dissent)* at 2 n.6.

[24] The following tables summarize comparable monthly average wholesale market prices for fresh Atlantic salmon:

Month	Norway 2–3 kg.	Domestic and Canadian 4–6 lbs.	Difference
July 1990	$ 3.66	$ 3.53	$ 0.13
Aug. 1990	$ 3.80	$ 3.28	$ 0.52
Sep. 1990	$ 4.15	$ 3.40	$ 0.75
Oct. 1990	$ 4.03	$ 3.33	$ 0.70
Nov. 1990	$ 3.89	$ 3.29	$ 0.60
Dec. 1990	$ 3.85	$ 3.25	$ 0.60
Jan. 1991	$ 3.85	$ 3.13	$ 0.72

Month	Norway 3–4 kg.	Domestic and Canadian 6–9 lbs.	Difference
July 1990	$ 4.05	$ 3.90	$ 0.15
Aug. 1990	$ 4.21	$ 3.78	$ 0.43
Sep. 1990	$ 4.49	$ 4.03	$ 0.46
Oct. 1990	$ 4.45	$ 3.84	$ .61
Nov. 1990	$ 4.45	$ 3.50	$ 0.95
Dec. 1990	$ 4.45	$ 3.25	$ 1.20
Jan. 1991	$ 4.45	$ 3.33	$ 1.12

Month	Norway 4–5 kg.	Domestic and Canadian 9–11 lbs.	Difference
July 1990	$ 4.25	$ 4.10	$ 0.15
Aug. 1990	$ 4.36	$ 4.02	$ 0.34
Sep. 1990	$ 4.75	$ 4.25	$ 0.50
Oct. 1990	$ 4.66	$ 4.09	$ 0.57
Nov. 1990	$ 4.70	$ 3.97	$ 0.73
Dec. 1990	$ 4.70	$ 3.45	$ 1.25
Jan. 1991	$ 4.70	$ 3.43	$ 1.27

AR List 1, Doc. No. 121, Appendix 12. The president of Connors Aquaculture, Inc., a firm with major operations in both the United States and Canada, testified that there is no difference in the price obtainable for U.S. and Canadian like product when the same sizes are available in each country. *See Plaintiffs' Reply Brief on Remand* at 25 n.55.

ion, which was adopted in part by the three dissenting Commissioners upon remand.[25]

Commissioner Brunsdale found that the domestic supply elasticity is close to zero; such an inelastic supply implies that the principal effect of unfairly traded subject imports will be to depress or suppress prices for domestic like product, rather than to decrease the domestic industry's sales volume. *April 1991 ITC Determination* at 27–28 (Acting Chairman Brunsdale, dissenting). Thus, relatively older record evidence supports a determination that at one time subject imports did depress and suppress prices. Subsequent events, however, must also be taken into account. Commissioner Brunsdale made four additional findings worthy of note: (1) the elasticity of demand for Atlantic salmon is approximately –2.5; (2) the elasticity of substitution between Norwegian and domestic salmon is roughly 6; (3) the elasticity of substitution between Norwegian salmon and non-subject imports is also approximately 6; and, (4) the elasticity of substitution between domestic salmon and non-subject imports is in a range from 6 to 10. *Id.* at 26–30. The high sensitivity of consumers to changes in the price of Atlantic salmon means that the volume of salmon sold in the U.S. market will vary greatly as a function of price. The high degree of substitutability between domestic like product, Norwegian salmon, and non-subject imports, means that any price disparity will likely result in reduced sales of the relatively more expensive product. The degree of substitutability between subject and non-subject imports is critical to an assessment of whether subject imports cause or threaten material injury to a domestic industry, particularly where: the subject merchandise is highly fungible; non-subject imports represent a significant share of the domestic market relative to subject imports; subject imports are relatively more expensive in comparison to non-subject imports; and, domestic consumers are highly sensitive to price.[26] All four criteria are present in this case.

The parties all agree that Atlantic salmon is a highly fungible product. In addition, by the end of 1990, total imports of Atlantic salmon from

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[25] Upon remand, Commissioners Brunsdale and Crawford adopted then Acting Chairman Brunsdale's original dissenting opinion in its entirety. Vice Chairman Watson joined his colleagues in adopting Acting Chairman Brunsdale's dissenting opinion, with the exception of its discussion of present material injury and lingering effects. *ITC Remand Results (Dissent)* at 1–2 & n.4.

[26] The court is careful to note that the degree of substitutability between subject and non-subject imports is relevant only to a determination of whether subject imports are "a" cause of present material injury. The causation prerequisite to an affirmative injury determination is satisfied if subject imports are shown to be more than a *de minimis* factor in contributing to conditions of present material injury. *Maine Potato Council v. United States*, 9 CIT 293, 299, 613 F. Supp. 1237, 1243 (1985). Subject imports need not be the sole cause, nor even the major cause, of such injury. *See British Steel Corp. v. United States*, 8 CIT 86, 96–97, 593 F. Supp. 405, 413 (1984). Once causation of present material injury is established, the ITC is not required to weigh the extent of injury from subject imports against the extent of injuries from other causes if there be any; indeed, once causation is established, the existence of other contributing causes is immaterial. *Atlantic Sugar, Ltd. v. United States*, 2 CIT 18, 24, 519 F. Supp. 916, 922 (1981); *see also United States Steel Group v. United States*, Slip Op. 94–201 at 46–48 (CIT Dec. 30, 1994) (discussing and contrasting two-step versus one-step causation analysis by the ITC).

Canada and Chile exceeded those from Norway.[27] By the time the ITC rendered its final determination in April 1991, there was almost no Norwegian salmon entering the domestic market. *April 1991 ITC Determination* at 24 (Acting Chairman Brunsdale, dissenting); *ITC Remand Results (Dissent)* at 2 n.6. Norwegian salmon that did enter the domestic market in the latter half of 1990 and early 1991 was sold at significantly higher prices, relative to both domestic like product and non-subject imports.[28] Based upon the high degree of substitutability between Atlantic salmon of various sources and the high price sensitivity of domestic consumers, one would expect the sales volume of the relatively more expensive subject imports to plummet; in fact, this expectation is borne out by record evidence. The domestic industry, however, did not take advantage of this retreat of the Norwegian supply from the domestic market. Instead, record evidence shows that the largest beneficiaries were producers of non-subject imports, particularly from Chile and Canada. Record evidence also shows that any pricing pressure experienced by the domestic industry at the time the ITC rendered its final determination was in no way caused by Norwegian salmon, but rather by such non-subject imports.[29]

It is this development of other nations replacing Norway as significant sources of Atlantic salmon which precludes a finding that subject imports are a present cause of price depression or suppression in this case. The ITC plurality's position, that early record evidence of price depression and suppression can support an affirmative finding of present material injury despite the fact that the most recent reliable record evidence belies a causal connection between subject imports and such price effects, is simply untenable. In other words, the ITC may not base an affirmative finding of present material injury solely upon early record evidence that imports cause injury where, as here, the most

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[27] The following summary of Atlantic salmon import volumes is drawn from Appendix A to the ITC's original determination:

	Quantity (1,000 kg.)			
Source	1987	1988	1989	1990
Norway	7610	8895	11,396	7699
Canada	700	1137	2958	4889
Chile	42	118	557	4077

April 1991 ITC Determination at A-43.

[28] *See supra* note 24; *infra* note 29.

[29] As noted, Canadian salmon generally fetched the same price as domestic like product. *Supra* note 24. The following table summarizes monthly average wholesale market prices for fresh Atlantic salmon from Chile, in dollars per kilogram:

Month	Chilean 2–3 kg.	Chilean 3–4 kg.	Chilean 4–5 kg.
July 1990	$ 3.20	$ 3.85	$ 4.08
Aug. 1990	* * *	$ 3.96	$ 4.12
Sep. 1990	$ 3.40	$ 4.08	$ 4.24
Oct. 1990	$ 3.38	$ 3.85	$ 4.13
Nov. 1990	$ 3.29	$ 3.48	$ 3.78
Dec. 1990	$ 3.25	$ 3.25	$ 3.45
Jan. 1991	$ 3.06	$ 3.25	$ 3.38

AR List 1, Doc. No. 121, Appendix 12. A comparison of prices for Chilean salmon with prices for domestic and Canadian salmon shows roughly equivalent pricing during these months. *See supra* note 24. In light of domestic consumers' high price sensitivity and of the high elasticities of substitution for this highly fungible product, the record is devoid of substantial evidence that significantly diminishing volumes of relatively more expensive subject imports continued to have any depressive or suppressive effect on domestic prices. *See id.*

recent reliable record evidence demonstrates that, due to changed circumstances, subject imports are no longer a cause of such injury. Consequently, in light of substantial record evidence of changed circumstances in this case, the court finds that the plurality's remand determination that subject imports are a present cause of price depression and suppression for domestic like product is not supported by substantial evidence in the record and thus cannot be sustained.

3. *Impact of Subject Imports on Domestic Producers:*

In evaluating the impact of subject imports on the domestic industry, the ITC is instructed to consider all relevant economic factors which have a bearing on the state of the industry in the United States.[30] In *Salmon I*, the court found that the examples cited by the ITC as evidence of a negative impact on the domestic industry appeared instead to be lingering effects of an injury which occurred in 1989. *Salmon I*, 16 CIT at 955. The court further noted that evidence that the effects of past injury continue to be felt by the domestic industry does not compel the immediate conclusion that subject imports are a cause of present material injury. *Id.* at 956. On remand, the ITC plurality continued to find that subject imports had actual and potential negative effects on the domestic industry in this case. *ITC Remand Results* at 18.

The term "material injury" is defined by statute to mean "harm which is not inconsequential, immaterial, or unimportant," 19 U.S.C. § 1677(7)(A) (1988). Situations where past sales of subject imports may create or threaten present material injury include instances in which such sales establish an exclusive channel of distribution through which unfair imports enter the domestic market, or where domestic producers continue to experience credit and financing difficulties due to future uncertainty.[31] As the court has previously discussed, the present material injury inquiry requires the ITC to determine whether the domestic industry has experienced such injury by reason of subject imports during the most recent period for which reliable record evidence is available. Thus, as a matter of law, any adverse lingering effects of past material injury, which are not themselves a source of present material injury to the domestic industry, are insufficient to support an affirmatiVe injury determination.

In its remand determination, the ITC plurality addressed several examples of the adverse effect subject imports had on the ability of the domestic industry to raise capital and investment in 1990. The most prominent example cited by the plurality is the liquidation of what had

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[30] These factors include, but are not limited to:

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
(II) factors affecting domestic prices,
(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(C)(iii) (1988). The ITC is further instructed to consider all relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. *Id.*

[31] *See ITC Remand Results (Dissent)* at 14 n.37.

been the largest domestic producer of like product, i.e. Ocean Products, Inc. ("OPI"). *ITC Remand Results* at 18–19. At the time OPI ceased operations and sold its fixed and swimming assets to Connors Brothers, Inc., [ ]. *ITC Remand Results* at 19. The plurality determined that [ ] was due in part to the fact that OPI was unable to obtain the price for its assets that it had originally sought. *Id.* Testimony offered at the public hearing by a representative of Connors Brothers supports the plurality's determination that past sales of Norwegian salmon were a source of future uncertainty in the industry, such that OPI stockholders were adversely affected. *Id.* A second example cited by the plurality is the testimony of one U.S. producer that past sales of subject imports created a negative investment climate throughout 1990 (and beyond) which caused his company to experience *current* difficulties in raising capital and obtaining financing. *Id.* at 19–20. Another U.S. producer reported similar problems. *Id.* at 20 n.79 (citation omitted). Plaintiffs dismiss this and other corroborating evidence in the record as mere "self-serving statements from selected petitIoning domestic producers * * *." *Plaintiffs' Brief on Remand* at 26. The fact remains, however, that this evidence is consistent, and it is uncontroverted in the record. Consequently, because the record demonstrates that the lingering effects of past sales of unfairly traded Norwegian salmon are presently causing an adverse impact on the domestic industry, the court finds that the plurality's conclusion that subject imports negatively affected the domestic industry is supported by substantIal evidence in the record and is in accordance with law. The plurality's remand determination is therefore sustained in this regard.

4. *Summary:*

In sum, the court finds that, on the particular facts of this case, the ITC plurality's determination that the most recent record evidence merits diminished weight is unsupported by substantial evidence on the record; rather, substantial record evidence supports the inclusion of this data in an assessment of whether the domestic industry suffers present material injury due to subject imports. In addition, the court finds that the plurality's determinations that: (1) the 1987–1989 increase in the volume of subject imports is significant, and (2) that subject imports are a current cause of price depression and suppression for domestic like product, are similarly unsupported by substantial evidence in the record. Nevertheless, based upon the entirety of the record, and particularly upon the significant absolute volume of subject imports during the POI and uncontroverted record evidence that the lingering effects of past sales of Norwegian salmon continue to adversely impact the domestic industry, the court finds that the plurality's affirmative injury determination is supported by substantial record evidence and in accordance with law. The ITC's affirmative injury determination on remand is therefore sustained.

B. *Commerce's Final AD and CVD Determinations:*

Plaintiffs raise various challenges to the final antidumping and countervailing duty determinations rendered by Commerce. Commerce published notice of the results of its final antidumping and countervailing duty determinations regarding Norwegian salmon on February 25, 1991. 56 Fed. Reg. at 7661, 7678. As noted, the ITC's final affirmative injury determination was issued on April 1, 1991. Commerce published notice of the resulting antidumping duty and CVD orders on April 12, 1991. 56 Fed. Reg. at 14,920, 14,921. On May 22, 1992, Commerce published notice that it had received timely requests from two of the respondents, i.e. Skaarfish and Salmonor, for an administrative review of its antidumping duty order for the period October 3, 1990 through March 31, 1992. 57 Fed. Reg. at 21,769. Salmonor subsequently withdrew its request for review on June 25, 1992. Commerce published the preliminary results of its review as to Skaarfish on April 2, 1993. 58 Fed. Reg. at 17,380–81. Notice of the final results of this administrative review were published on July 14, 1993. 58 Fed. Reg. at 37,912.

On May 27, 1993, Commerce published notice that The Coalition for Fair Atlantic Salmon Trade ("FAST") had timely requested a second administrative review of Commerce's antidumping duty order regarding subject imports. 58 Fed. Reg. at 30,767. The review covered eighty-five exporters including all of the respondents investigated in the original LTFV investigation, and the review period was from April 1, 1992 through March 31, 1993. *Id.* at 30,767–69. Notice of Commerce's preliminary results was published on December 14, 1993.[32] 58 Fed. Reg. at 65,333. On March 16, 1994, Commerce published notice of the final results of this administrative review. 59 Fed. Reg. at 12,242.

On May 12, 1994, Commerce published notice that it had received timely requests for a third administrative review of the antidumping duty order regarding imports of Norwegian salmon. 59 Fed. Reg. at 24,683. The period of this review is April 1, 1993 through March 31, 1994. *Id.* at 24,684. Commerce published notice of partial termination of this administrative review on September 16, 1994. 59 Fed. Reg. at 47,610. The preliminary results of this review have yet to be published. Lastly, with regard to its final countervailing duty determination, Commerce has not yet received any requests for administrative review of its CVD order.

1. *The Viability of Plaintiffs' Claims:*

Commerce is authorized to conduct administrative reviews of antidumping and countervailing duty orders pursuant to 19 U.S.C. § 1675 (1988). According to statute, at least once during each twelve month period beginning on the anniversary of the date of publication of a countervailing or antidumping duty order, upon receiving a timely request

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[32] Because FAST timely withdrew its request for administrative review of Skaarfish on August 25, 1993, Commerce terminated its review accordingly. Skaarfish's entries were therefore liquidated at the rate at which they were entered, and estimated duties on Skaarfish's subsequent entries continue to be assessed in accordance with the final results of Commerce's first administrative review of Skaarfish. 58 Fed. Reg. at 65,333–34.

for administrative review, Commerce shall review and determine the amount of any net subsidy and any antidumping duty. 19 U.S.C. § 1675(a)(1). The final results of such a review provide the basis for assessing antidumping and countervailing duties on entries made during the period of review,[33] as well as for the deposit of estimated duties to be made on subsequent entries of subject imports. 19 C.F.R. §§ 353.22(c)(10), 355.22(c)(10) (1994). If no review is requested, Commerce will instruct Customs to assess antidumping and countervailing duties on subject imports entered or withdrawn during the prior period at rates equal to the cash deposit of, or bond for, estimated duties required on that merchandise at the time of entry or withdrawal from warehouse for consumption, and to continue to collect the cash deposits previously ordered. 19 C.F.R. §§ 353.22(e)(1), 355.22(g)(1).

Thus, under normal circumstances, following the anniversary month of publication of an AD or CVD order, entries made during the prior period are liquidated with duties assessed in accordance with either the final results of an administrative review of the underlying order, or at a rate equal to the estimated duties required on the merchandise at the time of entry or withdrawal from warehouse for consumption if no review is requested.[34] The statute also provides, however, that interested parties may seek to enjoin liquidation of entries subject to an AD or CVD order upon a proper showing before this court that the requested relief should be granted under the circumstances. 19 U.S.C. § 1516a(c)(2) (1988); *see Zenith Radio Corp. v. United States*, 1 Fed. Cir. (T) 74, 76, 78, 710 F.2d 806, 808–09, 810 (1983) (the consequences of liquidation constitute irreparable injury sufficient to require the trial court to consider all appropriate factors in deciding whether to grant an injunction). Significantly, unless liquidation is so enjoined, entries made prior to the anniversary month of publication of an AD or CVD order are liquidated in accordance with either the original order or the final results of an administrative review of such order, notwithstanding the fact that there may be an outstanding challenge to such order pending before this court. Moreover, liquidation renders moot any pending court challenge to the underlying agency determinations regarding those entries, for the statutory scheme does not authorize this court to order a reliquidation of entries once they are liquidated in accordance with

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[33] For requests received during the first anniversary month after publication of an antidumping duty order, the review covers, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation to the end of the month immediately preceding the first anniversary month. 19 C.F.R. § 353.22(b)(2). For requests received in subsequent anniversary months, the review normally covers, as appropriate, entries, exports, or sales of the merchandise during the twelve months immediately preceding the most recent anniversary month. 19 C.F.R. § 353.22(b)(1).

For requests received during the first anniversary month after publication of a countervailing duty order, the review covers entries or exports, as appropriate, during the period from the date of suspension of liquidation to the end of the most recently completed reporting year of the government of the affected country. 19 C.F.R. § 355.22(b)(2). For requests received in subsequent anniversary months, the review normally covers entries or exports of the merchandise during the most recently completed reporting year of the government of the affected country. 19 C.F.R. § 355.22(b)(1).

[34] If, however, an agency determination is contested pursuant to 19 U.S.C. § 1516a(a), then such liquidation will occur only as to those entries which are entered or withdrawn from warehouse for consumption on or before the publication date of a notice of a decision of this court or of the Court of Appeals for the Federal Circuit which is not in harmony with the agency determination. 19 U.S.C. § 1516a(c)(1) (1988). Subsequent entries are liquidated in accordance with the final court decision in the action, as are any entries the liquidation of which has been enjoined by court order. 19 U.S.C. §§ 1516a(e), 1516a(c)(2).

either an outstanding AD or CVD order, or the final results of an administrative review of such order. *Zenith Radio Corp.*, 1 Fed. Cir. (T) at 7S, 710 F.2d at 810; *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 396, 590 F. Supp. 1260, 1265 (1984).

Consequently, if liquidation occurs prior to the completion of judicial review of an AD or CVD determination, and duties are assessed pursuant to either the original order or the final results of an administrative review of such order, any outstanding challenges to the AD or CVD determination are rendered moot as to the liquidated entries because such entries are no longer amenable to the reach of this court. Furthermore, if the final results of an administrative review of an AD or CVD order are published, any outstanding challenges to Commerce's underlying AD or CVD determination are similarly rendered moot as to *subsequent* entries of the subject merchandise, because estimated duties are to be assessed on such entries in accordance with the final results of the administrative review and *not* Commerce's original AD or CVD order.[35] *See, e.g., PPG Indus., Inc. v. United States*, 11 CIT 303, 309, 660 F. Supp. 965, 970 (1987); *Silver Reed Am., Inc. v. United States*, 9 CIT 221, 224 (1985).

In this case, plaintiffs failed to obtain a § 1516a(c)(2) injunction against liquidation of the entries covered by the original AD and CVD orders. As a result, because Commerce has published notices of the final results of its two administrative reviews of the antidumping duty order covering imports of Norwegian salmon, plaintiffs' various challenges to Commerce's final antidumping determination are rendered moot and must therefore be dismissed. Plaintiffs' challenge to Commerce's final CVD determination is similarly rendered moot as to those entries that have been liquidated; however, because Commerce has yet to receive a request for administrative review of its CVD order, that order continues to provide the basis for assessing estimated CVDs on imports of Norwegian salmon. Because plaintiffs' claim raises a live controversy over the magnitude of estimated CVDs to be assessed, the court turns to an examination of plaintiffs' challenge to Commerce's final CVD determination.

2. *Commerce's CVD Determination:*

On February 15, 1991, Commerce reached a final determination that certain benefits, which constitute subsidies within the meaning of the countervailing duty law, were being provided to producers or exporters in Norway of fresh and chilled Atlantic salmon in the amount of 0.71 Norwegian kroner per kilogram. 56 Fed. Reg. 7678 (Feb. 25, 1991). One element of this net subsidy consisted of loans from the Regional Development Fund ("RDF") and the National Fishery Bank of Norway ("NFB"). Because the loans provided by the RDF were limited to business entities located in specific regions of Norway, they were considered

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[35] Interested parties may separately challenge the results of an administrative review in this court pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (B)(iii) (1988).

to be countervailable. Similarly, because the loans provided by the NFB were limited to the fishery industry, they were also found to be countervailable. 56 Fed. Reg. at 7679–80.

In each instance, in order to measure the countervailable benefit, Commerce subtracted the interest paid on loans in 1989 from the interest that would have been paid at the rate that Commerce found to be the commercial benchmark rate for 1989. According to Commerce this commercial rate was 15.65 percent, consisting of 14.9 percent, which Commerce found to be the effective long-term interest rate in 1989, plus a risk premium of 0.75 percent. *Id.* Plaintiffs argue that Commerce's decision to include this 0.75 percent risk premium is unsupported by substantial evidence in the record and should be reversed. The court disagrees.

The crux of plaintiffs' argument on this point is semantical. Commerce's verification report for the Christiana Bank states:

> We asked officials what the effective short-term interest rate was for 1989. They estimated that the rate was between 14 and 15 percent. The Bank officials stated that they charge a risk premium of 0.75 percent on all fish farm loans. The risk premiums the Bank charges other industries vary according to the customer and the nature of the loan.[36]

Plaintiffs argue that because Christiana bank officials spoke of the risk premium in the present tense, while speaking of the 1989 short-term interest rate in the past tense, Commerce could not infer that the bank had charged the 0.75 percent risk premium in 1989. At most, the cited statement is ambiguous about whether the risk premium charged by the Christiana Bank in September 1990 was also being charged in 1989. Commerce clearly directed its question with regard to the bank's lending practices in 1989, and this is the context within which the bank responded. Moreover, plaintiffs ignore the additional record evidence supporting Commerce's inclusion of a risk premium for 1989. The verification report for Den Norske Bank ("DNB") states:

> We asked if DNB provides loan guarantees. We were told that the Bank provides guarantees based on the risk of the applicant. Prior to 1986, the standard guarantee premium charged was two percent per year. Since 1986, the premium has been set on a customer-by-customer basis to reflect the risk of the applicant. Bank officials stated that currently the prime guarantee fee would be about 0.3 percent. Generally, the fish farming industry is charged higher premiums than other customers, since the industry's financial health has been poor * * *. [S]ince March of 1989, the DNB is no longer making loans to new clients involved in fish farming due to the current financial situation of the industry.

CVD Verification Report at 33. It is therefore apparent that the general financial ill-health of Norwegian fish farms dates to at least March 1989.

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[36] U.S. Dep't of Commerce, *Verification Report for the Government of Norway in the Countervailing Duty Investigation of Fresh and Chilled Atlantic Salmon from Norway* at 32 (Nov. 15, 1990) (*AD Pub. Spool No. 2*, frame 449) ("*CVD Verification Report*").

Commerce was thus fully warranted in inferring that the risk premium being charged to fish farms by the Christiana Bank in 1990 was also being charged in 1989. Because Commerce's decision to include a 0.75 percent risk premium is supported by substantial evidence in the record and in accordance with law, Commerce's CVD determination is sustained.

III. Conclusion

Upon review of the results of remand to the ITC, the court sustains the plurality's affirmative injury determination. Although the court finds that portions of the plurality's remand determination are unsupported by substantial record evidence, the court concludes that, when viewed in its entirety, the record does contain substantial evidentiary support for the plurality's ultimate conclusion. The ITC's affirmative finding of present material injury is therefore sustained.

The court also finds that Commerce's decision to include a 0.75 percent risk premium in its CVD calculations is supported by substantial record evidence. The court therefore affirms Commerce's final CVD determination. Lastly, with regard to Commerce's final antidumping determination, plaintiffs' various claims have been rendered moot and are, therefore, dismissed. Judgment will be entered accordingly.

(Slip Op. 95–6)

SKF USA Inc. and SKF Industrie, S.p.A., plaintiffs *v.* United States, defendant, and Torrington Co., and Federal-Mogul Corp., defendant-intervenor

Court No. 92–07–00513

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) imposition of a difference in merchandising adjustment cap as a test for identifying similar merchandise; (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price when the rate reported was based upon inventory value, thereby resorting to best information available; (3) disallowance of early payment cash discounts as an adjustment to foreign market value; (4) rejection of plaintiffs' reporting of domestic presale inland freight on its U.S. sales and punitive resorting to best information available; (5) failure to account for discounts and rebates in its profit calculation on further manufactured merchandise; and (6) disallowance of certain billing adjustments as a direct adjustment to foreign market value.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated January 20, 1995)

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel, Thomas J. Trendl and *Juliana M. Cofrancesco)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Stephen J. Claeys, Dean A. Pinkert, Stacy J. Ettinger* and *Thomas H. Fine,* Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and *Myron A. Brilliant)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel, J. Eric Nissley and *Joseph A. Perna, V)* for defendant-intervenor, Federal-Mogul Corporation.

OPINION

Tsoucalas, *Judge:* Plaintiffs, SKF USA Inc. and SKF Industrie, S.p.A. ("SKF"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings ("AFB") (other than tapered roller bearings) and parts thereof from Italy. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 57 Fed. Peg. 28,360 (June 24, 1992)

Specifically, plaintiffs contest Commerce's (1) imposition of a difference in merchandising adjustment cap ("difmer") as a test for identifying similar merchandise; (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price ("USP") when the rate reported was based upon inventory value, thereby resorting to best information available ("BIA"); (3) disallowance of early payment cash discounts as an adjustment to foreign market value ("FMV"); (4) rejection of plaintiffs' reporting of domestic presale inland freight on its U.S. sales and punitive resorting to best information available; (5) failure to account for discounts and rebates in its profit calculation on further manufactured merchandise; and (6) disallowance of certain billing adjustments as a direct adjustment to foreign market value.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (May 15, 1989). On June 28, 1991, July 19, 1991 and August 14, 1991, Commerce initiated administrative reviews with respect to various manufacturers and exporters from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, including SKF Industrie, S.p.A., for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania,*

Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews, 56 Fed. Reg. 29,618 (June 28, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 33,251 (July 19, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 40,305 (August 14, 1991).

On March 31, 1992, Commerce published the preliminary results of its second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 57 Fed. Reg. 10,859 (March 31, 1992)

On June 24, 1992, Commerce published one joint final determination for the nine administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360 (June 24, 1992).

On July 24, 1992, SKF filed its summons in this case, challenging the final results with respect to Italy.

Discussion

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), aff'd, 894 F.2d 385 (Fed Cir. 1990).

1. *Difference in Merchandise Adjustment Cap:*

SKF challenges Commerce's use of a 20% difference in merchandise adjustment cap, in addition to a family model match methodology which takes eight physical criteria into account, to determine what constitutes similar merchandise. According to SKF, Commerce's institution of a difmer cap, after a hearing which followed the second review preliminary results, is a last-minute change which undermines the ability of parties to predict Commerce's actions and to alter their pricing behavior. SKF also alleges that Commerce failed to sufficiently explain its change in methodology. In sum, SKF challenges Commerce's imposition of the difmer cap in the second review where there was no difmer cap in the first review. *Brief in Support of Plaintiffs' Motion for Judgement Upon the Agency Record ("SKF's Brief")* at 20–30.

Commerce argues that the application of the difmer cap was a proper exercise of its discretion and was meant to ensure that a reasonable com-

parison of merchandise would be made. Commerce asserts that it has broad discretion in its selection of what constitutes "similar" merchandise and may refine its methodology in succeeding reviews. Since the two tests employed in the final determination of the second review are complimentary, the cap minimizes the effects of distortions where there is a difference in the variable costs of production and there are no circumstances in this case to warrant disregarding the cap, Commerce claims its decision was in accordance with law. Commerce states that as this is only the second review, SKF cannot claim a significant reliance on the fact that Commerce had not applied the 20% difmer cap in the original investigation or in the first administrative review. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief")* at 6–16.

Defendant-intervenor The Torrington Company ("Torrington") agrees with SKF that the difmer cap should not be applied and additionally, contests the use of the family model match methodology. Torrington alleges that Commerce's definition of "similar merchandise" was impermissibly narrow and limiting. *Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Torrington's Brief")* at 7–15.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") opposes SKF on grounds that SKF failed to show that the use of the difmer cap had any effect on the margin calculations. *Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief")* at 25–27.

When identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. 19 U.S.C. § 1677(16) (1988).[1] Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of FMV calculations. 19 U.S.C. § 1677(16); *see Timken*

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[1] 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

Co. v. United States ("Timken I"), 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986). Undoubtedly, Commerce's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken I*, 10 CIT at 95, 630 F. Supp. at 1336.

Thus, contrary to the assertion of Torrington, the statute does not require Commerce to use a methodology that identifies the greatest number of matches of similar merchandise.

Further, when comparing merchandise which is similar, 19 U.S.C. § 1677b(a)(4)(C) (1988) directs Commerce to adjust foreign market value for differences in merchandise being compared.

In this administrative review, Commerce determined what constituted "similar merchandise" for purposes of comparing U.S. and foreign market sales by grouping bearings into families based upon eight defined physical characteristics. Commerce also employed a 20% difmer cap so that bearings having a greater than 20% difference in their variable costs of manufacture would not be treated as "similar." *Final Results*, 57 Fed. Reg. at 28,364–67.

This Court finds that Commerce's action was within the broad discretion it is granted to determine "similar merchandise". Its action on this issue was in accordance with law and supported by substantial evidence and is hereby affirmed.

2. *U.S. Inland Insurance Expense Adjustment:*

SKF contests Commerce's adjustment of USP for U.S. inland insurance expense. First, SKF claims that the expense was insignificant and should therefore have been disregarded, pursuant to 19 C.F.R. § 353.59(a) (1992). SKF asserts its U.S. inland insurance rate to be well within the guideline provided in 19 C.F.R. § 353.59(a). Second, SKF asserts Commerce inappropriately applied BIA. SKF states it omitted the requested information from the computer tape because it considered it insignificant, but reported the information in its Section B narrative response. SKF states Commerce unreasonably resorted to BIA because Commerce accepted SKF's reporting both in the first review and in the preliminary results of the second review and did not request SKF to supplement or correct its reporting. Finally, SKF alternatively argues that if the adjustment was warranted, Commerce used the incorrect information by applying the insurance rate to unit price even though it had been reported as a percentage of inventory value. SKF's Brief at 30–34.

SKF requests a remand with instructions to Commerce to either disregard SKF's U.S. inland insurance or apply its rate to the reported base of inventory value. *Id.*

Commerce's position is that the adjustment was reasonable and that its use and choice of BIA was reasonable as well, since SKF failed to provide the information requested. Commerce asserts it alone has the discretionary authority to disregard insignificant adjustments pursuant to 19 C.F.R. § 353.59(a) and, as there was clear evidence that inland insur-

ance expenses existed, Commerce properly adjusted for it. Commerce also claims its use of BIA was appropriate since it requested that SKF report the information under appropriately labeled variables. Although SKF did report the amount of inland insurance expense in its narrative response, it specifically refused to include the information in its computer tapes. Commerce asserts such non-compliance justifies the use of BIA and its choice of BIA (the U.S. inland insurance rate reported in SKF's narrative submission to unit prices less billing adjustments) was a reasonable choice. *Defendant's Brief* at 16–20.

Defendant-intervenors Torrington and Federal-Mogul echo the arguments made by Commerce, pointing out that SKF had five months in which to correct the submitted information. *Torrington's Brief* at 15–21; *Federal-Mogul's Brief* at 7–10.

19 U.S.C. § 1677f–1(a) (1988) provides:

> For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority *may*—
>
> * * * * * * *
>
> (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

(Emphasis added.)

19 C.F.R. § 353.59 (a) states:

> The Secretary *may* disregard adjustments to foreign market value which are insignificant. *Ordinarily*, the Secretary will disregard individual adjustments having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the foreign market value.

(Emphasis added.)

Thus, the statute provides not only that Commerce is the appropriate authority to determine whether an adjustment is insignificant, but also that it is Commerce that has the discretion to determine whether or not to disregard an insignificant adjustment. This Court therefore finds that it was properly within Commerce's discretion to determine whether the adjustment at issue was insignificant and whether or not to disregard it.

SKF assigned "zero" to its U.S. inland insurance variable on its computer tape. As a result, Commerce determined that:

> * * * SKF understated the amounts of U.S. inland insurance on its computer tape. We have used the factor provided by SKF [in the narrative portion of its questionnaire response] to calculate U.S. inland freight and deducted this amount from U.S. price for the final results.

Final Results, 57 Fed. Reg. at 28,398.

The antidumping statute provides that, whenever a party refuses or is unable to provide information requested in a timely manner and in the form required, Commerce shall use BIA. 19 U.S.C. § 1677e(c) (1988). In

this case, however, the record reveals that Commerce had not requested this information or, more accurately, instructed SKF not to report it on its computer tapes having reported it in its narrative response. Commerce's questionnaire specifically instructed:

> * * * omit any expense item for which the values for all sales are derived by applying the same factor or percentage to the value of another item. For example, if the per-unit direct advertising expense amount is derived for all ESP sales by multiplying the unit price by three percent, do not include the direct advertising variable in your computer listing. Provide the factor or percentage, and the basis to which it should be applied, in your narrative response.

Public Document No. 26, frame 1721, p. 15. U.S. inland insurance expense was exactly such an expense item, reported as a percentage. SKF complied with the instructions, providing in its narrative response the applicable percentage and the item against which the percentage should be multiplied. It is uncontroverted that SKF provided this information in its narrative response. Therefore, this Court finds that Commerce should not have resorted to BIA.

Having determined that it was not for SKF to decide whether its expense was insignificant or should be disregarded and that Commerce should nonetheless not apply BIA, this Court must determine what information should be applied for SKF's U.S. inland insurance expense. Although SKF reported that the correct base to which SKF's insurance rate should be applied was inventory value, Commerce applied the rate to unit price, calling it BIA. Commerce provided no explanation for choosing price over value or for rejecting the information provided by SKF. Upon consideration of the record, this Court can find no reason that Commerce should have chosen a price base in place of the cost base provided. Therefore, this Court finds that Commerce's application of the U.S. inland insurance rate reported in SKF's narrative submission to the unit price less billing adjustments was not supported by substantial evidence. This issue is remanded for Commerce to apply SKF's U.S. inland insurance rate to inventory value.

3. *Early Payment Cash Discounts:*

SKF contends that Commerce's rejection of SKF's cash discounts on home market sales as a direct adjustment to foreign market value is contrary to law since the discounts were verified and directly related to sales. SKF states Commerce unreasonably deviated from its methodology in the first review. SKF argues that, at minimum, Commerce should treat the discounts as an indirect adjustment to FMV as it typically has done with expenses disallowed as direct expenses. *SKF's Brief* at 34–41.

SKF made a claim for home market cash discounts as to three of its business units, Cuscinetti, Industrie and Speciali. For sales by Cuscinetti, SKF states cash discounts were available to all customers under certain payment terms. Those sales during the period of review were divided by the cash discounts granted to arrive at the cash discount rate. SKF asserts that as the rates reported match those set forth in payment

terms, all customers eligible for the discounts must have indeed been granted such discounts. Accordingly, SKF argues, the discounts granted and reported by Cuscinetti are directly related to the reported sales for which cash discounts were claimed. *Id.* at 34–37.

For sales by Industrie and Speciali, SKF explains that for each company, total cash discounts granted were divided by total home market sales for 1990 and for the first four months of 1991. The resultant factors were then multiplied by the price to derive a per unit cash discount value reported by Industrie and Speciali in their sales response. The two entities reported discounts by allocating, on a period basis, all home market discounts across all home market sales. SKF asserts this reporting methodology was reasonable and accurate. *Id.* at 37–38.

Commerce asserts its denial of both direct and indirect adjustments was proper because SKF failed to report the claimed discounts on an actual sales-specific or customer-specific basis. Commerce states it generally does not permit the allocation of discounts, but instead requires that they be reported on a transaction-specific basis. Commerce emphasizes that it does not permit the allocation of discounts across all sales because such a practice distorts actual prices for each specific sale: sales for which a discount was incurred will be allocated less of the discount than was actually incurred and sales for which no discount was incurred will nonetheless be allocated a portion of the total discounts. The only exception to the allocation of discounts that Commerce allowed in this review was when a customer-specific allocation was used, in which case Commerce would grant such a discount as an indirect expense. *Defendant's Brief* at 21–27.

With respect to Cuscinetti, Commerce states SKF failed to report the cash discounts on either a transaction-specific or customer-specific basis. Commerce states the total discounts granted were allocated across all sales for which the discount was offered, irrespective of whether the discounts were actually incurred on each of those sales. With respect to Industrie and Speciali, Commerce asserts that these companies did not have cash discount programs at all. Commerce states that when these companies had been underpaid by certain customers, the companies referred to the amount by which they had been underpaid as "cash discounts." Commerce asserts such underpayments are not properly considered cash discounts. As with the discounts claimed by Cuscinetti, Commerce states those claimed by Industrie and Speciali were not reported in either a transaction-specific or a customer-specific manner. *Id.* at 22–26.

Torrington and Federal-Mogul agree with the arguments made by Commerce and request that the Court affirm Commerce's action. *Torrington's Brief* at 21–25; *Federal-Mogul's Brief* at 11–17.

Commerce explained its methodology in the Final Results:

> The Department has treated home market discounts, rebates and price adjustments as *direct* expenses if they could be traced on a transaction-specific basis. This includes adjustments that were

> incurred as a fixed and constant percentage of sales price over all sales and were reported on a customer- or product-specific basis. If these adjustments were not fixed and constant but reported on a customer-specific basis, they were treated as *indirect* expenses. If the discounts, rebates and price adjustments could not be traced on a customer-specific basis, *no adjustment* was made. Although we allowed customer-specific allocations on home market sales in the first reviews, we have reconsidered our position and decided to allow only price adjustments which were tied to specific sales under comparison. In this way, we avoid applying reductions to FMV for sales that did not actually incur those reductions.

Final Results, 57 Fed. Reg. at 28,400 (emphasis added).

Upon consideration of the administrative record, this Court finds that in the case of all three entities, Cuscinetti, Industrie and Speciali, SKF's allocation of discounts fails to distinguish those sales for which cash discounts were granted from those for which cash discounts were not granted.

Commerce makes adjustments for discounts and rebates pursuant to 19 U.S.C. § 1677a (1988) and 19 U.S.C. § 1677b (1988), which require it to determine what price was actually charged for subject merchandise. *See Torrington Co. v. United States*, 17 CIT ___, ___ 818 F. Supp. 1563, 1578–79 (190–3). More specifically, the Federal Circuit has held that, to allow an adjustment to FMV, it must be directly correlated with specific in-scope merchandise on the basis of actual costs. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

Because it failed to report its claimed cash discounts on a customer-specific or transaction-specific basis, SKF cannot be allowed a direct or an indirect adjustment to FMV for home market cash discounts. *See Torrington Co. v. United States*, 17 CIT ___, 850 F. Supp. 1 (1993). Thus, this Court does not reach the issue of whether, in the case of Industrie and Speciali, underpayment by certain customers constitutes a cash discount, and hereby affirms Commerce's actions on the basis of SKF's allocation methodology.

4. *Reporting of Domestic Presale Inland Freight:*

SKF asserts Commerce acted arbitrarily and without support in the record by rejecting SKF's reporting methodology for domestic presale inland freight. SKF states Commerce erred by applying another respondent's rate as BIA. Finally, SKF argues Commerce should have made a corresponding direct adjustment to foreign market value. *SKF's Brief* at 41–45.

Commerce states it properly applied its methodology of treating presale inland freight as a movement expense and deducting it from USP. Commerce asserts that for purposes of this deduction it must analyze individual U.S. sales. Because SKF did not report its presale inland freight separately, as it had been requested to do, but in a pool of U.S. indirect selling expenses, Commerce argues it properly resorted to the use of BIA. *Defendant's Brief* at 28–33. Defendant-intervenors

Torrington and Federal-Mogul agree with the position taken by Commerce. *Torrington's Brief* at 25–31; *Federal-Mogul's Brief* at 18–23.

Commerce is required to reduce USP by movement expenses. 19 U.S.C. § 1677a(d) (1988) states, in pertinent part:

> The purchase price and the exporter's sales price shall be adjusted by being—
>
> * * * * * * *
>
> (2) reduced by—
>
> (A) * * * the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, *incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States.*

(Emphasis added.) *See also* 19 C.F.R. § 353.41(d)(2)(i) (1992).

In this review, Commerce requested that SKF report its domestic presale inland freight expenses. Commerce's questionnaire included separate questions for those expenses and for other export-related indirect selling expenses. In fact, the two questions appeared ten pages apart. Public Document No. 27, frame 1821–32, pp. 23–33. It is clear from these separate questions that Commerce did not intend the expenses to be reported together in one pool. *See id.* SKF, however, did not separately report domestic presale inland freight as a direct expense and included the expense as part of export selling expenses. *SKF's Brief* at 42.

SKF's presale inland freight expenses involve expenses in the U.S. market, not the home market. It is well-established that the adjustment to be made when a respondent has failed to properly report those expenses is to treat them as direct expenses, even though this may have the effect of lowering USP and increasing dumping margins. *See*, e.g., *Timken Co. v. United States*, 11 CIT 786, 804, 673 F. Supp. 495, 512–13 (1987); *see also Torrington Co. v. United States*, 17 CIT ____, ____, 832 F. Supp. 365, 376, 378 (1993); *see also Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 4,951, 4,955 (Feb. 11, 1992); *see also Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 65,228, 65,229 (Dec. 16, 1991). In addition, there is no basis for SKF's assertion that Commerce must make a corresponding direct adjustment to foreign market value. *See Sharp Corp. and Sharp Elecs. Corp. v. United States*, 18 CIT ____, ____, 852 F. Supp. 1072, 1076–77 (1994). This Court therefore affirms the methodology employed by Commerce.

The antidumping statute provides that, whenever a party refuses or is unable to provide information requested in a timely manner and in the form required, Commerce shall use BIA. 19 U.S.C. § 1677e(c) (1988). In this case, that is precisely what happened: SKF failed to separately report its pre-sale inland freight expenses, although Commerce had

instructed SKF to do so. Therefore, this Court finds that Commerce properly resorted to BIA.

As Commerce's treatment of domestic presale inland freight and its application of BIA were in accordance with law and supported by substantial evidence, this issue is hereby affirmed.

5. *Discounts and Rebates on Further Manufactured Merchandise:*

SKF contends that, although Commerce's practice is to make an adjustment to price for discounts and rebates in the profit calculation of further manufactured merchandise as well as in its calculation of USP and FMV, Commerce improperly failed to account for such discounts and rebates in its profit calculation in this case. *SKF's Brief* at 45–47. Commerce requests a remand of this issue so it can deduct discounts and rebates before calculating the profit on U.S. further manufactured sales. *Defendant's Brief* at 33.

In its reply brief, SKF respectfully seeks to withdraw its claim as to this issue because an additional analysis of the Commerce program revealed that the appropriate price adjustments had indeed been done. *Reply Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record* at 43–44.

Accordingly, this Court will not further discuss this issue and does hereby affirm Commerce's action on this issue.

6. *Billing Adjustments:*

SKF asserts Commerce improperly disallowed certain of SKF's home market billing adjustments as direct adjustments to foreign market value. These adjustments were reported on a customer-specific basis because SKF was unable to report them on a transaction-specific or product-specific basis. SKF asserts that, after accepting SKF's billing adjustments at verification and in its preliminary results, Commerce abused its discretion by later rejecting them. *SKF's Brief* at 48.

Commerce responds that it properly rejected the direct adjustments because they were not reported on a transaction-specific basis. Commerce treated adjustments which were allocated upon a customer-specific basis as indirect selling expenses. Commerce reiterates its arguments discussed above regarding SKF's claimed adjustment for discounts. *Defendant's Brief* at 34–36. Federal-Mogul agrees with the position taken by Commerce. *Federal-Mogul's Brief* at 23–24.

Torrington agrees that Commerce properly disallowed a direct adjustment to FMV, but argues that Commerce erred in allowing even an indirect adjustment to FMV for billing adjustments because they could not be identified to particular sales transactions or be limited to in-scope merchandise. *Torrington's Brief* at 31–35.

Commerce explained its methodology:

> The Department has treated home market discounts, rebates and price adjustments as *direct* expenses if they could be traced on a transaction-specific basis. This includes adjustments that were incurred as a fixed and constant percentage of sales price over all sales and were reported on a customer- or product-specific basis. If

> these adjustments were not fixed and constant but reported on a customer-specific basis, they were treated as *indirect* expenses. If the discounts, rebates and price adjustments could not be traced on a customer-specific basis, *no adjustment* was made. Although we allowed customer-specific allocations on home market sales in the first reviews, we have reconsidered our position and decided to allow only price adjustments which were tied to specific sales under comparison. In this way, we avoid applying reductions to FMV for sales that did not actually incur those reductions.

Final Results, 57 Fed. Reg. at 28,400 (emphasis added).

For the reasons set out above regarding SKF's claimed adjustment for discounts (issue number 3), this Court affirms Commerce's decision to deny direct adjustments to FMV for home market billing adjustments because SKF did not report them on a transaction-specific basis and they were not a fixed and constant percentage of sales price over all sales. As to Commerce's decision to treat billing adjustments as indirect selling expenses when reported on a customer-specific basis, this Court finds, as it has done in the past, that methodology to be reasonable and in accordance with law. *See Torrington Co. v. United States*, 17 CIT ____, ____, 832 F. Supp. 365, 377 (1993), *modified, in part, remanded,* 18 CIT ____, 850 F. Supp. 7 (1994). Therefore, this Court affirms Commerce's action as to this issue.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/6 1/20/95 Musgrave, J.	Gabrielle of New York, Inc.	92–04–00241 92–02–00242	381.2325 30%	791.7660 6%	Agreed statement of facts	New York (Newark) Men's acrylic and leather sweaters

Index

Customs Bulletin and Decisions
Vol. 29, No. 6, February 8, 1995

U.S. Customs Service

Treasury Decisions

Customs Service Decisions

General Notices

U.S. Court of International Trade

Slip Opinions

Abstracted Decision

U.S. G.P.O. 1995–387–567–00022